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COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*,

Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

Motion for Leave to File Brief as Amicus Curiae on Behalf of Respondents and Brief of Amicus Curiae.

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Motion for Leave to File Brief as Amicus Curiae on Behalf of Respondents.

The United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL-CIO, Region 6, and Paul Schrade, its Regional Director, move hereby for leave of Court to file a brief as amicus curiae with respect to the above entitled matter, and in support of said motion present the following reasons.

Consent to file a brief as amicus curiae with respect to the above entitled matter has been granted by attorneys for respondents, but denied by attorneys for petitioners.

The UAW, Region 6, encompasses the eleven Western states, and represents 75,000 members living

and working in the State of California. In California, as elsewhere, the UAW has been hampered in its efforts to maximize employment opportunities for all its members, regardless of their race, color, religion, national origin or ancestry, by the existence of residential segregation which reflects the patterns of prejudice and the lack of a free and open housing market.

When North American Aviation, Inc., located a major space production facility in Orange County, California, Negro members were required to commute 70 to 90 miles daily from Los Angeles, or else forfeit this employment opportunity. When General Motors moved its Oakland plant to Freemont, California, Negro members were effectively denied jobs because they could not obtain housing in the new community.

When the Ford Motor Company located a new plant in Milpitas, California, Negro members were denied access to the housing accommodations necessary to acceptance of the jobs which were otherwise open to them. As a result, the UAW itself developed and financed a cooperative housing project which would enable Negro members to obtain housing in the vicinity of their employment.

These examples can be multiplied by the countless similar opportunities lost every day by qualified men and women locked in urban ghettos throughout the state. The only remedy which strikes at the roots of their frustration is the development of a free and open housing market, which operates without regard for considerations of race, religion, or country of origin. Leave is sought to file a brief amicus curiae with respect to the constitutionality of Article I, §26 of the California

Constitution because of the relationship between that question and the development of a free and open housing market in California.

The heart of the brief which the moving party seeks leave to file with this Court is an exploration and analysis of the purpose of the enactment of Article I, §26, based both upon its own language and its legal, social, and historical context. Included is reference to extensive source materials revealing the nature of the considerations which led to its proposal and eventual adoption.

It is the belief of the moving party that much of the above analysis and information will not be fully presented to this Court by the parties to this proceeding. This belief is based upon discussion with attorneys for plaintiffs and respondents, and upon the nature of the arguments made and approaches used by the parties in the courts of California. The moving party believes that knowledge of the background of Article I, §26, is so essential to an understanding of the constitutional issues before this court that any brief which might shed some additional light on this question should be taken into consideration in its deliberations.

The opinion of the Supreme Court of California was based, in large part, upon an attempt of that Court to find a "partnership" or significant relationship between the State of California and the private acts of discrimination perpetrated upon respondents by petitioners. The moving party advances the proposition in its brief that it is not necessary to find such a significant involvement by the State of California in these acts of discrimination in order to find that Article I, §26

is in violation of the Fourteenth Amendment to the United States Constitution. The moving party contends that the enactment of Article I, §26 was *per se* unlawful because its purpose and result was the perpetuation of residential segregation based upon race. On the same grounds heretofore advanced, it is believed that these questions will not be adequately presented by the parties.

WHEREFORE it is prayed that leave of Court be granted to the UAW to file a brief as amicus curiae with respect to the above entitled matter.

Respectfully submitted,

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Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL-CIO, Region 6, and Paul Schrade, Its Regional Director as Amicus Curiae.

STATEMENT OF INTEREST.

The United Automobile, Aerospace, and Agricultural Implement Workers of America, representing 1,750,000 members throughout the United States and 75,000 living and working in California, is proud of its position in the vanguard of the struggle to insure equal treatment for every American, regardless of the color of his skin, where he goes to church, or the country of his birth.

The UAW has fought for equal employment opportunity with the firm conviction that the greatest nation on earth can provide jobs for everyone willing and able to work, and that increased buying power resulting from increased employment means increased prosperity for all. The UAW also recognizes its obligation to all of its members, regardless of race, color, or creed, to maximize their employment opportunities. But it has found, in California as elsewhere, that employment opportunities are restricted by factors beyond the control of labor and management alike. One of the most important of these is the widespread existence of residential segregation based upon the patterns of prejudice.

When North American Aviation, Inc. located a major space production facility in Orange County, Negro members were required to commute 70 to 90 miles daily from Los Angeles or forfeit this employment opportunity. When General Motors moved its Oakland plan to Freemont, California, Negro members were effectively denied jobs because they could not obtain housing in the new community.

When the Ford Motor Company located a new plant in Milpitas, California, Negro members were denied access to the housing accommodations necessary to acceptance of jobs which were otherwise open to them. As a result, the UAW itself developed and financed a cooperative housing project which would enable Negro members to obtain housing in the vicinity of their employment.

These dramatic examples must be multiplied by the countless thousands of opportunities lost daily to men

and women locked in urban ghettos throughout the state. The remedy lies not in union built housing or in changing plant location. The remedy lies in a free and open housing market, which operates without regard for considerations of race, religion, or country of origin. The UAW thus has a direct and vital stake in any attempt either to facilitate or inhibit the development of such a housing market. It is for this reason that this brief is filed on behalf of plaintiffs and respondents herein.

Statement of Facts.

Plaintiffs and respondents are a Negro couple who brought suit in the courts of California under the provisions of the Unruh Civil Rights Act, Cal. Civil Code §§51 and 52. This Act proscribes discrimination within the state on the basis of race by "business establishments of every kind whatsoever." Among the businesses covered is that of providing housing accommodations to the public, and the remedies available include the right to both damages and injunctive relief. *Burks v. Poppy Construction Co.,* 57 Cal. 2d 463 (1962).

The complaint filed by respondents alleged that they had been denied access to housing accommodations in an apartment complex owned and managed by defendants and petitioners solely because of their race. For purposes of determining the constitutional issues involved in these proceedings, the allegations of the complaint stand as admitted. *Mulkey v. Reitman,* 64 A.C. 557, 559-560 (1966).

It is undisputed that, at the time of filing, respondents' complaint stated a sufficient cause of action

under California law. But subsequent to filing, and prior to trial on the merits, Proposition 14 was enacted by a vote of the people of California, and became effective as Article I, § 26 of the California Constitution. Article I, § 26 reads in pertinent part as follows:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such persons as he, in his absolute discretion, chooses.

This is the initial sentence of Article I, § 26, and its major operative provision. Upon its enactment, petitioners moved for judgment on the pleadings. Their motion was granted by the trial court on the sole ground that "the passage of Proposition 14 has rendered Civil Code §§51 and 52 upon which this action is based null and void." See *Mulkey v. Reitman,* 64 A.C. 557, 560 (1966).

The trial court was clearly constrained to take this position, or else violate the newly enacted constitutional mandate from the people of California. To enforce the provisions of the Unruh Civil Rights Act would be to deny, limit or abridge the absolute discretion accorded by Article I, §26: something which the court—like every other agency of state government—was forbidden to do.

The enactment of Article I, §26 had placed a barrier between the plaintiffs and the legal right, for-

merly accorded them under state law, not to be discriminated against solely on the basis of their race. It became the shield with which the defendants deflected the legal consequences of their admittedly discriminatory conduct.

But for the enactment of Article I, §26, plaintiffs would have been entitled to—and received—affirmative relief under California law, up to and including access to the housing accommodations which they desired, and for which they were qualified in every respect except their race. But for the active intervention of this expression of popular will, utilizing the mechanisms of government and supported by the full panoply of state power, they would have been free to occupy the property they sought without restraint.

Through the subsequent action of the California Supreme Court, on appeal from the decision of the trial court, the barrier was removed. Article I, §26 of the California Constitution was itself held void as a denial of the right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. Thus the defense which had been advanced by petitioners was eliminated. As a result, respondents have been restored to the same position they had as plaintiffs prior to the enactment of Article I, §26. *Cf. Hill v. Miller,* 64 A.C. 819 (1966).

LEGAL ARGUMENT.

The analysis of the nature and effects of Article I, §26 has posed conceptual difficulties, from the very beginning, for those who seek to fit their attack upon its constitutionality within the traditional and established concepts of Fourteenth Amendment guarantees. The difficulties have been manifest in the written briefs, in oral argument, and in the opinion of the California Supreme Court itself. They arise from the peculiar nature of the enactment, and the particular context in which it has come before the Court. They are not the only difficult questions which this case presents for decision, but their resolution lies at the heart of any decision which is rendered. The circumstances giving rise to them may be summarized as follows:

1. The act of discrimination complained of by respondents was the act of private individuals with respect to their own property. Because they felt themselves aggrieved by this act, respondents sought the aid of the state in obtaining a remedy. Assistance was denied to them because the state had chosen not to provide a remedy for the type of conduct of which complaint was made. Taken in this context, the state's only act was to refuse to act. How can this refusal to act be found unlawful unless the state was under an affirmative obligation to provide a remedy for the conduct involved?

2. Article I, §26 itself has no coercive effects. It is a declaration of governmental neutrality in an area where government may legitimately choose not to act. It represents a return to the state of the law existing before legislation proscribing discrimination in

housing was passed. If it was not mandatory under the United States Constitution to adopt such legislation, then how can it be unlawful to repeal it?

These are not easy questions to answer—when taken out of the context in which Article I, §26 was enacted. When Article I, §26 is placed within its social, legal, and historic context, however, they readily assume different proportions, and the problems they raise become more semantic than real. This case has aspects which appear unique, an attribute which certainly has not been unique in cases involving the subleties of racial discrimination. It is the intent of this brief to demonstrate that, even if unique in form, they are not unique in substance. Once this has been established, Article I, §26 becomes but one more sophisticated mode, adapted to the particular circumstances of the time and place at which it was enacted, to the same proscribed ends.

I.

THE ENACTMENT OF ARTICLE I, SECTION 26 OF THE CALIFORNIA CONSTITUTION CONSTITUTED STATE ACTION.

Article I, §26 of the California Constitution was a constitutional amendment proposed by the initiative process. It appeared as Proposition 14 on the ballot for the California General Election held on November 3, 1964, and was enacted by a vote of the people at that election.

There can be no doubt that the enactment of Article I, §26 constituted state action. The authority to amend the Constitution was derived from the state. California Constitution, Art. IV, §1. The mechanism necessary to amend the Constitution was furnished by the

state and its political subdivisions. California Constitution, Art. IV, §1; Cal. Elections Code §§3501, 3506-7, 3530-3533, 3559-3574; Cal. Government Code §§12165, 12167. The result was a declaration of public policy made by the fundamental instrument of state government.

In proposing and adopting Article I, §26, the people of California acted as an agency of state government, exercising through their reserved powers a traditional governmental function.

> "When the electorate assumes to exercise the lawmaking function, then the electorate is as much a state agency as any of its elected officials. It is thus apparent that, while state action may take many forms, the test is not the novelty of the form but rather the ultimate result which is achieved through the aid of state processes." *Mulkey v. Reitman*, 64 A.C. 557, 570 (1966).

The only question remaining, therefore, is whether enactment of Article I, §26 represented state action of a type prohibited by the Fourteenth Amendment to the United States Constitution.

The prohibited state action may be found in different ways. The arguments presented to the Supreme Court of California, and the Court's own opinion demonstrate that different avenues may ultimately lead to the same destination. But whichever road is taken, it is necessary to distinguish between two basic approaches which may be adopted, because the approach adopted will determine the nature of the relief which is afforded.

The first approach might be summarized as follows: There was state action, which was the enactment of Article I, §26 of the California Constitution. There was a private act of discrimination, the denial of access to housing solely on the basis of race, which would have been unlawful if engaged in by the state. The final and most difficult step is to connect the two through demonstrating a significant involvement by the state, through enactment of Article I, §26, in the private act of discrimination.

The second approach, unlike the first, does not rely upon the existence of the private conduct in order to demonstrate the illegality of the state action. Rather, determination of the unconstitutionality of Article I, §26 is made independently of the specific facts of the instant case. This is not to say that decision is made without reference to case or controversy. It is the existence of Article I, §26 which, if valid, will prevent respondents from obtaining relief. A determination of its constitutionality is thus necessary to a determination of their legal rights. But this may still be accomplished without demonstrating specific relationship between the state enactment and the private conduct, as is attempted under the first approach.

Under the second approach state action is found, as under the first approach, in the enactment of Article I, §26. But the *unlawful* state action is also found in the enactment itself. Thus, if the purpose of the enactment was invidious discrimination, and the result of the enactment was invidious discrimination, then the enactment would be unlawful *per se,* without the necessity of

showing a relationship between the conduct of the state and the conduct of the defendants in the instant case.

If the first approach is adopted, then the private act becomes unlawful because of the existence of Article I, §26. The supposedly private conduct either becomes tainted by the public law or itself assumes a public character. The party aggrieved by the discriminatory conduct would then be entitled to judicial relief independent of statutory remedy or the specific provisions of state law because his right would arise directly under the Fourteenth Amendment.

If the second approach is adopted, then Article I, §26, would be held void as state action denying the equal protection of the laws, and respondents in the instant case would be left in the same position they would have been but for the enactment. They would be entitled to utilize only those remedies for denial of housing accommodations on the basis of race which are provided by state law.

The decision in the instant case rendered by the Supreme Court of California demonstrates a certain amount of overlap between the two approaches discussed above. The Court finds state action in the enactment of Article I, §26. The Court finds discrimination in the denial of housing to respondents on the basis of their race. It then attempts to demonstrate a "partnership" between the two. It discusses the proposition that state action or involvement may render theoretically private conduct unlawful. But it appears to find that it is the state action which has become tainted by the private conduct. The result is a finding that Article I, §26 is void, thus permitting respondents to

seek legal redress. But their right to redress remains contingent upon the remedies available under state law. *Hill v. Miller,* 84 A.C. 819 (1966).

It is the contention of amicus that the enactment of Article I, §26 of the California Constitution was discriminatory in both intent and effect, as the supreme Court of California decided. It is the belief of amicus that the adoption of the second approach elucidated above will offer the most straight-forward and satisfactory answer to the question of the constitutionality of Article I, §26. The remainder of this argument will therefore be devoted to a presentation supporting the relationship and relevance of that approach to this case.

II.

THE ENACTMENT OF ARTICLE I, SECTION 26 OF THE CALIFORNIA CONSTITUTION HAD AS ITS PURPOSE AND RESULT THE PERPETUATION OF RESIDENTIAL SEGREGATION BASED UPON RACE.

A. Enforcement of Constitutional Guarantees Against Racial Discrimination Requires Determination of the Purpose and Results of State Action Drawn, in Part, From an Examination of the Conditions Under Which It Was Taken.

The enforcement of Fourteenth and Fifteenth Amendment guarantees has frequently required the courts to balance state claims of an innocent or permissible exercise of its lawful authority against allegations of invidious racial discrimination. The resultant decisions clearly establish the weight which must be accorded both the purpose of state action and its consequences when such a challenge is made.

In *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), an ordinance of the City and County of San Francisco required the consent of the Board of Supervisors to maintain or contruct a wooden laundry. On its face, it was a lawful exercise of governmental authority to promote the public health and safety. Nowhere in the ordinance was there reference to race or ancestry. But its intent and effect was to permit an exercise of discretion by the Board which would prevent Chinese from running laundries.

Sei Fujii v. California, 38 Cal. 2d 718 (1952), involved a statute prohibiting the ownership of real property by aliens ineligible for citizenship. Once again, on its face, there appeared to be a permissible exercise of the state's police power. Nowhere in the statute was there mention of race or ancestry. But once again its intent and effect—in this case to keep Japanese out of farming—was clear. By its terms the law classified persons on the basis of eligibility to citizenship, but in fact it classified on the basis of race or nationality.

As the demands of the Fourteenth and Fifteenth Amendments became more insistent and their enforcement more vigorous, increasingly complex and ingenious methods were devised to thwart them. But the United States Constitution nullifies sophisticated as well as simple-minded modes of discrimination, and even where the methods used have been circuitous and complex, the effects have been direct and the intent blatantly obvious.

In *Guinn v. United States,* 238 U.S. 347 (1915), this Court struck down a literacy requirement for Oklahoma electors which was coupled with a "grandfather clause"

exempting those entitled to vote on January 1, 1865 (when no Negro could qualify) and their lineal descendants. Oklahoma responded by passing a new law, which provided that voters in the general elections of 1914 automatically remained qualified voters, while others had a twelve day period in which to register or forfeit their voting privileges. In *Lane v. Wilson,* 307 U.S. 268 (1939), this Court analyzed that legislation as follows:

> "The practical effect of the 1916 legislation was to accord to the members of the Negro race who had been discriminated against in the outlawed registration system of 1914 not more than 12 days within which to reassert constitutional rights which this court found in the Guinn case to have been improperly taken from them. We believe the opportunity thus given Negro voters to free themselves from the effects of discrimination to which they never should have been subjected was too cabined and confined. The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise." *Lane v. Wilson, supra,* at 276.

The enforcement of constitutional guarantees against racial discrimination thus requires the courts to look beyond the language of a statute or constitutional amendment. State action must be judged in its social, legal and historical context. "Only by sifting facts and weighing circumstances can the . . . involvement of the

State . . . be attributed its true significance." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).

In *Anderson v. Martin,* 375 U.S. 399, 403 (1964), the court examined a statute in light of the "'private attitudes and pressures' towards Negroes at the time of the enactment." Similarly, in *NAACP v. Alabama,* 357 U.S. 449 (1958) and *Bates v. Little Rock,* 361 U.S. 516 (1960), the court relied upon a showing that private acts of retaliation would follow public disclosure of the Association's membership lists.

Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), affd., 336 U.S. 933 (1949), struck down a constitutional amendment submitted to popular vote which required that voters be able to understand and explain any article of the Constitution of the United States. The District Court acted after examining "the conditions existing at the time, and . . . the circumstances and history surrounding [the amendment's] origin and adoption . . ." *Davis v. Schnell, supra,* at 880. It took judicial notice of the history of the period immediately preceding the adoption of the amendment, examined campaign materials, and referred to statements made by the measure's proponents.

In a subsequent opinion, this Court analyzed its reasons for affirming as follows:

> *"The legislative setting of that provision* and the great discretion it vested in the registrar made clear that a literacy requirement was merely a de-

vice to make racial discrimination easy." [emphasis added] *Lassiter v. Northampton Election Board,* 360 U.S. 45, 53 (1959).[1]

It thus becomes clear that intent and effect may be determinative of the validity of state action and the applicability of Fourteenth Amendment restraints. " 'Acts generally lawful may become unlawful when done to accomplish an unlawful end.' " *Gomillion v. Lightfoot,* 384 U.S. 339, 347 (1960).

Thus in prohibiting the abandonment of public education by Prince Edward County, Virginia, this court declared:

> "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, *the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.*" [emphasis added] *Griffin v. School Board,* 377 U.S. 218, 231 (1964).

The courts will not shut their eyes to that which all others can see and understand, nor will a state be allowed to achieve by indirection that which it may not do directly. The sword of justice will pierce through the layers of subterfuge and circumvention to lay bare the core of tyranny.

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[1]See also, *Louisiana v. United States,* 380 U.S. 145 (1965); *United States v. Mississippi,* 380 U.S. 128 (1965).

B. Examination of the Circumstances Surrounding the Origin and Adoption of Article I, Section 26 of the California Constitution Reveal That Its Purpose and Result Was to Perpetuate Residential Segregation Based Upon Race.

This case once again presents to this Court the onerous but essential task of balancing the assertion of a lawful exercise of governmental authority against the allegation of invidious racial discrimination. Thus, once again, this Court must ascertain the fundamental purpose of state action and the results which it will have. To do so, it is once again necessary to look beyond the specific language of an enactment, and view it in its social, legal and historical context.

1. California's Cities Clearly Evidence a Widespread and Deeply Ingrained Custom of Residential Segregation Based Upon Race.

The first fact of relevance in evaluating the intent and effect of Article I, §26 of the California Constitution is the social fact of a widespread and deeply ingrained custom of residential segregation based upon race which exists throughout California. It requires no resort to law books or libraries to substantiate; only the common experience which comes through living in our state's communities or driving through its cities' streets.

Yet, if anything, the extent of this phenomenon is greater and its nature graver than ordinary experience reveals. Perhaps it is best illustrated by the factual reports of governmental bodies created to analyze it.

The Los Angeles County Commission on Human Relations reports that the City of Los Angeles is di-

vided into four districts by the City Planning Commission: (1) the central district, (2) the southern district, (3) the western district, and (4) the San Fernando Valley district. Of the 334,916 Negroes living in the City of Los Angeles, 313,866, or 93.7 per cent, lived in the central district at the time of the 1960 census.

The central district consists of 30 named communities. A total of 290,278, or 86.6 per cent of the Negroes living in this district lived in nine of those 30 communities, which comprise approximately one-third of the geographical area of the central district and considerably less than 10 per cent of the city's total area.

Outside of the central district, there were 21,050 Negroes living in the City of Los Angeles, an increase of 12,297 over the 1950 census figures. But 10,869 of this number merely joined the already segregated communities of San Pedro, Venice and Pacoima.[2]

In San Diego, the pattern is the same. Of the 34,435 Negroes who lived in that city in 1960, 82 per cent lived in 10 of the 123 census tracts, while 84 census tracts have less than nine Negroes and 32 tracts contained no Negroes at all. Governor's Advisory Commission on Housing Problems, *Report on Housing in California,* 38 (1963), hereinafter referred to as *"Report on Housing"*.

The same pattern is repeated in the Northern part of the state. One census tract in Alameda contained 69.5 per cent of the city's Negroes. Two census tracts

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[2]The above statistical information was derived from a paper entitled, "Population and Housing in Los Angeles County: A Study in the Growth of Residential Segregation," published by the Los Angeles County Commission on Human Relations in 1963.

in Berkeley contained 34.6 per cent of that city's Negro population and had a Negro population of 91.6 per cent. In San Francisco, 21.1 per cent of the city's Negro population lived in four census tracts with a Negro population of 68.6 per cent. *Report on Housing* at 39.

Even these figures are misleading because the lines of the census tracts do not follow the lines of the racial ghettos. As we know from common experience, within the census tracts the patterns of discrimination are even more clearly marked.

But it is outside the Negro ghettos of the central city, in the "white ghettos" of the suburbs, that the pattern of discrimination is most striking and most blatant.

> "The California Advisory Committee of the U.S. Commission on Civil Rights said it was 'almost impossible' for minorities to buy new homes in new subdivisions. In Northern California, fewer than 100 nonwhites have been able to buy houses in unsegregated tracts in a period during which 350,000 new homes were built." *Report on Housing* at 39.

Between 1950 and 1960 the population of the San Fernando Valley increased from 311,016 to 738,831. During this period, the number of Negroes in the San Fernando Valley increased from 2,593 to 9,790. But reflected in this figure is an increase of 7,450 Negroes in the already segregated community of Pacoima. Thus, the 1960 census showed a total of 911 Negroes living in the San Fernando Valley outside of the Pacoima ghetto: a *decrease* of 253 persons since 1950.[3]

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[3]Information derived from "Population and Housing in Los Angeles County", *supra.*

This residential segregation is largely the result of racial discrimination in the sale and rental of residential real property. The lower income of racial minorities is a factor conditioning their geographic concentration. "Housing bias, however, serves a concomitant role with lower income to intensify concentrations within well-defined census tracts in the central cities." *Report on Housing* at 38. No one in California requires evidence beyond his own personal experience to substantiate this fact. It is a fact of which the Supreme Court of California has taken judicial notice in *Jackson v. Pasadena City School District*, 59 Cal. 2d 876, 881 (1963).

2. Residential Segregation Based Upon Race Was Fostered and Promoted Through the Interrelated Actions of State Government and Individuals Subject to Government Regulation.

Once established, segregated housing patterns are difficult to break. Individual decision easily becomes a function of the environment created by others. Discrimination feeds upon itself, and the introduction of a minority race into a previously restricted community may be made the occasion for fear and alarm. Yet the original development of segregated housing patterns was far more than the simple result of individual decision. Segregated communities were fostered and developed through the policies and practices of state agencies and individuals subject to state regulation.[4]

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[4]For a further exposition of government involvement in the development of segregated housing, see Loren Miller, *Government's Responsibility for Residential Segregation*, RACE AND PROPERTY (Diablo Press 1964).

A major factor in determining housing patterns is the position taken by the real estate industry:

> "The real estate broker is a key man in the majority of housing transactions. He finds buyers for housing and housing for buyers and he has detailed knowledge (or access to it) of the location of homes of various styles and prices. His policies and practices are among the foremost influences that determine where the various racial or religious groups will live." *Report of the United States Commission on Civil Rights,* No. 4 (1961) pp. 122-123.

But the policies and practices of the real estate industry reveal a history of hostility and opposition to residential integration:

> "Property owners' prejudices are reflected, magnified, and sometimes even induced by real estate brokers, through whom most housing changes hands. Organized brokers have, with few exceptions, followed the principle that only a 'homogenous' neighborhood assures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin. . . ." *Report of the United States Commission on Civil Rights,* No. 4 (1961) p. 2.

The applicability of these conclusions to California is amply documented by the California Real Estate Magazine, "official publication" of the California Real Estate Association. A random sample of its pages through

the years clearly reveals the attitude of the Association towards the relevance of race in the housing market, as well as furnishing evidence of the activities of the local associations.

The July, 1927 issue reported that:

> "After a survey of questionnaires and accompanying letters sent President Harry B. Allen of the California Real Estate Association . . . it is apparent that the color question has not become a serious problem in the northern half of the state, but is being gravely considered in all large cities and many exclusive residential communities in the southern half of the state. Most of these cities have already had foresight enough to provide subdivision restrictions and community agreements of owners to maintain an 'All Caucasian' district where colored races cannot encroach on territory already settled or being settled by the white race." "Color Question in California Reveals Many Problems," by Serena B. Preusser, Private Secretary to President Harry B. Allen. *California Real Estate Magazine,* July, 1927, p. 35.

The article then goes on to summarize some of the responses received to the questionnaires:

> "Pasadena has a large number of negroes [sic] who are recently trying to move into desirable sections of the city. Through subdivision restrictions and owners' agreements it is attempting to hold them in check . . .
>
> "The Los Angeles Realty Board recommends that Realtors should not sell property to other than Caucasians in territories occupied by them. Deed

and Government Restrictions probably are the only way that the matter can be controlled; and Realty Boards should be interested. This is the general opinion of all Boards in the state. . . .

"Stockton suggests that if the real estate operator uses common sense and good judgment untainted by extreme selfishness or avarice, he will offer no property in neighborhoods inhabited by the races in question and save himself trouble and worry by restricting the grant, and thus preventing the invasion of a district by other than the white race. . . .

"The only people of foreign races in Beverly Hills are servants. Glendale, too, prides itself on being an 'All American' city. . . .

"Mexicans do not wish to force themselves into better districts and when improvements are made they usually leave for a poorer district. They do not try to force themselves where they are not wanted; but negroes [sic], it is held, seem anxious to get into a white district to command a big price to leave." *California Real Estate Magazine,* July, 1927, pp. 35, 61.

In June, 1939, the magazine reprinted the Code of Ethics of the California Real Estate Association and the National Association of Real Estate Boards, including Article 34, which provides:

"A realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality or any individuals whose presence will

clearly be detrimental to property values in that neighborhood." *California Real Estate Magazine,* June, 1939, p. 142.

The following year, the Southwest Branch of the Los Angeles Realty Board was presented the Achievement Award for 1940. Included in its Achievement Report was the following description of its activities:

> "Race Restrictions: Our very energetic Race Restrictions Committee is doing a wonderful piece of work in the community, assisted by a few volunteer property owners. In one large tract, petitions for imposing race restrictions have been circulated and notarized and over 90% of the property owners have signed them . . ." "Southwest Branch Winning Achievement Report," *California Real Estate Magzine,* December, 1940.

A similar report was made by the Glendale Real Estate Board in its award winning Achievement Report for for 1942. "Glendale Winning C.R.E.A. Achievement Report," *California Real Estate Magazine,* March, 1942, p. 18.

When this Court held that racially restrictive covenants were unenforceable in *Shelley v. Kraemer,* 334 U.S. 1 (1948), the Los Angeles Realty Board responded by launching ". . . a nationwide campaign to amend the United States Constitution to guarantee enforcement of property restrictions . . ." "Enforcement of Race Restrictions Through Constitutional Amendment Advocated." *California Real Estate Magazine,* September, 1948, p. 4.

The reasons for this campaign were explained as follows:

> ". . . millions of home owners of the Caucasian race have constructed or acquired homes in areas restricted against occupancy by Negroes. The practice of surrounding homes in such areas with the security of such restrictions has become a traditional element of value in home ownership throughout this nation. . . .
>
> ". . . The threat of occupancy by Negroes of property in such areas depreciates the value of all home properties and constitutes a direct deterrent to investment in the construction or acquisition of homes of superior quality whether large or small. . . .
>
> ". . . The insistance of some Negroes upon moving into areas previously restricted exclusively to the occupancy of Caucasians will necessarily create racial tensions and antagonisms and do much harm to our nation's social structure." *California Real Estate Magazine,* September, 1948, p. 4.

The key position which the real estate industry occupies in the housing market should not require further elaboration. It is self-evident. The same is true of the builders and developers who control hundreds and thousands of homes in new developments in those very suburban communities where the results of housing discrimination are most obvious.

Both of these industries have been subjected to extensive regulation by the state in the interest of the public health and safety. See *Cal. Business and Professions Code,* §§10000-10249.2 and 11000-11709.

Such regulation dates back to 1917. See *Stats.* 1917, Ch. 758, p. 1579. Yet until 1962, when the Unruh Act was applied in *Burks v. Poppy Construction Co.,* 57 Cal. 2d 463 (1962), to builders and developers and in *Vargas v. Hampson,* 57 Cal. 2d 479 (1962), to real estate brokers, they remained free to foster and promote the development of the very segregated communities held by those cases to be detrimental to the public welfare. Until that time, the State of California ignored these activities. Yet it continued to regulate and restrict other activities, by the same individuals, of far less importance to the community.

In addition, the state acted to place its own power and prestige behind these discriminatory practices. In 1919, the Supreme Court of California approved judicial enforcement of restrictive covenants. *Los Angeles Investment Company v. Gary,* 181 Cal. 680 (1919). The courts of California continued to enforce these agreements until 1949, when the Supreme Court of the United States held such action in violation of the Fourteenth Amendment. *Shelley v. Kraemer,* 334 U.S. 1 (1948).

The most important result of the state's action during the intervening years was not the bringing of lawsuits to enforce restrictive covenants, but the extent to which such lawsuits became unnecessary because individuals shaped their conduct to fit what they believed the law to be. Here, as elsewhere, the impact of our system of law is found not so much in its enforcement as in its educative and deterrent effect, which acts to change conduct so that legal sanctions need not be applied.

3. The National Public Policy Against Racial Discrimination, and the Detrimental Effects of Residential Segregation Based Upon Race, Ultimately Led to the Adoption of a Public Policy Against Discrimination in the Housing Market.

After *Shelley v. Kraemer, supra,* had made the national public policy clear, California's courts reversed their previous policy to prohibit any state involvement in the development or maintenance of segregated housing. The decision in *Barrows v. Jackson,* 112 Cal. App. 2d 464 (1952), anticipated the decision of the Supreme Court of the United States that damages could not be awarded for violation of a restrictive covenant. *Barrows v. Jackson,* 346 U.S. 249 (1953). That same year, the San Francisco Housing Authority was compelled to terminate its policy of allowing neighborhood housing patterns to determine eligibility for admission to publicly financed housing. *Banks v. Housing Authority,* 120 Cal. App. 2d 1 (1953). In *Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242 (1962), it was held that a court acting upon an unlawful detainer action could not refuse to consider a claim of racial discrimination as a defense to that action.

The Supreme Court of California recognized and emphasized the detrimental effects of residential segregation:

> "Discrimination in housing leads to lack of adequate housing for minority groups [citation omitted], and inadequate housing conditions contribute to disease, crime, and immorality." *Burks v. Poppy Construction Co.,* 57 Cal. 2d 463, 471 (1962).
>
> "Residential segregation is in itself an evil which tends to frustrate the youth in the area and to

cause antisocial attitudes and behavior." *Jackson v. Pasadena City School District,* 59 Cal. 2d 876, 881 (1963).

In 1959, the California Legislature responded to the detrimental effects of residential segregation with an affirmative program designed to promote the public health and safety. The Hawkins Act, *Stats.* 1959, Ch. 1681, p. 4074, proscribed discrimination by the owners of publicly assisted housing, while the Unruh Act, *Civil Code* §§51-52, prohibited discrimination "in business establishments of every kind whatsoever", including those in the business of furnishing housing accommodations. *Burks v. Poppy Construction Co., supra.*

But many felt that these laws were still not sufficient to make an impact on California's widespread and deeply ingrained custom of racial discrimination in the housing market, with the resultant well-established patterns of residential segregation. Under these laws,

> ". . . a citizen who is prevented from buying a house because of discrimination must have an attorney and go to court. And the unfortunate truth is that those who most frequently need to take such action are those who can least afford it." *Statement of Governor Edmund G. Brown on Human Rights,* transmitted to the California Legislature on February 14, 1963. See also Kaplan "Discrimination in California Housing: the Need for New Legislation," 50 Calif. L. Rev. 635 (Oct., 1962).

Thus, in 1963, the California Legislature passed the Rumford Act, Health and Safety Code §§35700-35744, empowering the Fair Employment Practice Commission to accept complaints of discrimination in housing.

Taken together, California's laws against discrimination in housing provided a means for enforcing the public policy of state and nation, as well as protecting public health and safety from the evils flowing from the perpetuation of residential segregation. The only property interest they affected was the use of property to injure another through denying him the right to acquire it *solely* because of his race, color, religion, national origin or ancestry. The only sanctions provided were for committing the specific act declared unlawful: discrimination based solely on those grounds.

Yet the campaign for an initiative constitutional amendment to add §26 to Article I, the Declaration of Rights of the California Constitution, was well under way within a year after passage of the Rumford Act by the state legislature. Petitions were circulating within months after the Rumford Act became effective, and the amendment was placed on the ballot at the next general election.

4. Article I, Section 26 of the California Constitution Was a Direct Response to the Very Concept of Governmental Concern With Discrimination in the Housing Market Because It Threatened the Perpetuation of Segregated Housing.

This, then, is the social, legal, and historic context in which Article I, §26 was proposed and passed, and in which it must be judged. That task can now be completed by turning directly to its own language and to the assertions of its proponents, revealed through the campaign materials which they circulated. They must be examined together for neither, standing alone, fully reveals the truth.

The major operative provision of Article I, §26 is contained in its initial sentence:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The approach adopted by the authors of Article I, §26 and proponents of Proposition 14 was a circuitous one, and at least arguably, somewhat misleading. On its face, Proposition 14 assumed the character of a protection of existing right, applicable equally to all and possibly covering a number of different situations. Nowhere did it mention race. Nowhere did it refer to discrimination. Nowhere did it even denominate specific statutes or judicial decisions which it would effect. This approach accorded with a general technique which had already been adopted elsewhere. *Cf., e.g.,* Property Owners Bill of Rights, found in the appendix, Exhibit B and Detroit Homeowners Ordinance, set forth in *Turner v. Leadbetter,* 9 Race Rel. L. Rep. 322, 324.

By contrast, the intended consequences of the passage of Proposition 14 were simple and direct. Public debates, newspaper articles, and campaign materials make clear what had been common knowledge in the community and freely admitted since the day petitions began to circulate: Proposition 14 was concerned exclusively with state policies which bore on discrimination in the housing market.

This is easily demonstrated by reference to the major campaign materials circulated by the proponents of

Proposition 14, appended hereto as Exhibit B. Nowhere in these documents is there to be found mention of any law or legal problem not related to government concern with racial discrimination which would necessitate enactment of Article I, §26. It is also demonstrated by newspaper articles such as the Los Angeles Times editorial appended as Exhibit A. This, of course, corresponds to what one would expect from the circumstances under which Proposition 14 was passed.

But the campaign materials circulated by proponents of Proposition 14 tell only half the story. They, too, can be misleading if taken alone and at face value, for they focus attention almost exclusively on the Rumford Act and abuses which allegedly occurred under it. Thus it has been argued that enactment of Article I, §26 did no more than repeal California's Fair Housing Laws and put us right back where we were before they were passed. See, *i.e.*, "Realtors Hit U.S. Stand on Proposition 14", Los Angeles Times, Nov. 12, 1964, Part I, p. 10. *Cf., Mulkey v. Reitman,* 64 A.C. 557, 574 (dissenting opinion).

But the Rumford Act, standing alone, was clearly not the real target of Proposition 14, nor was Proposition 14 aimed at the reform of specific abuses or inequities in the administration of California's Fair Housing Laws. Once reference to extrinsic evidence has established the true area of concern of Article I, §26, the very language of that section belies the claims of its proponents as to its scope, and reveals beyond contravention its true purpose.

Article I, §26 is written in broad, sweeping terms. Its language is absolute and all-inclusive. It declares

a private right to discriminate which exists as an imperative absolute—without qualifications, without exceptions, and without limits. Article I, §26 acts to place this right beyond the reach of legislature, courts, executive and administrative agencies. It does not repeal existing legislation. Rather, its declaration of right is interposed between the private conduct it protects and the governmental authority to restrain it, preventing both present enforcement and future enactment. It also restrains the judiciary from exercising its authority to afford protection to self-executing constitutional guarantees and common law rights. (*Cf. Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242 [1962]).

This is the scope of Article I, §26, and its scope reveals its true intent. An infinite choice was open to the authors of Proposition 14 in dealing with the procedures used in administering California's laws protecting equal opportunity in the housing market. The range of choice was limited only by their imagination and ingenuity, and the extent of real or imagined grievances.

The use of administrative procedure could have been permanently proscribed. Jury trials could have been made mandatory. An award of damages could have been provided for—either against complainants or against the state—for expenses resulting from legal action, and compensation made available to a respondent or defendant for any economic hardship or personal inconvenience he might suffer. Of course, any or all of California's Fair Housing Laws could have been expressly repealed.

Every conceivable objection to California's laws could have been obviated without using the absolutist approach which was adopted except for the one that they might lead to integrated neighborhoods.

Thus Article I, §26 stands revealed as more than simply a reaction to the particulars of statutory procedure or judicial decision. It is a response to the very concept of governmental interest in the elimination of residential segregation through promotion of equal opportunity in the housing market. Its intent and effect is not only to nullify governmental action already taken, but to free completely those who discriminate on the basis of race, color, religion, national origin or ancestry in the sale or rental of housing accommodations from the threat of further or future restrictions. As the ballot argument in support of Proposition 14 proclaimed:

> "Your 'Yes' vote on this constitutional amendment will *guarantee* the right of all home and apartment owners to choose buyers and renters of their property as they wish, *without interference by State or local government.*" [emphasis added] *Proposed Amendments to Constitution,* General Election, 1964, p. 18.

It is true that, in theory, this language and the language of Article I, §26 might also be applied to situations not involving racial or religious discrimination. But neither the social, legal or historic context in which Proposition 14 arose, nor the circumstances surround-

ing its adoption provide any indication that such considerations were relevant. The Supreme Court of California found that,

> "Proposition 14 was enacted . . . with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right." *Mulkey v. Reitman*, 64 A.C. 557, 562-563 (1966).

This finding, amply supported by the evidence before it and by the common knowledge of the people of the State of California, should be accorded great weight in the deliberations of this Court.

Attempts have been made by those who seek to validate Article I, §26 to conjure up meaningful alternatives to that governmental power which it eliminated. The illusory and hypothetical schemes which result only demonstrate further the extent to which *effective* government power was removed. If residential segregation based upon race is a consequence of discrimination in the housing market, so long as such discrimination persists, segregation will continue.

Public housing programs, for example, might help alleviate some problems of inadequate housing. But they cannot affect segregation if they are islands of equality in an uncontrolled and uncontrollable sea of absolute individual discretion. To present such programs as solutions to discrimination in housing is like advocating more government jobs to solve the problems arising from discrimination in employment.

To speak, alternatively, of voluntary action is merely to rephrase the conclusion that this is an area of absolute individual discretion from which the police powers of the state have been removed. To posit a police power which must protect the public health and safety through moral suasion and good will alone, without recourse to regulation, is to posit a police power which does not exist.

Of course Article I, §26 can always be repealed in the same way in which it was enacted. But Article I, §26 was not passed in order to be repealed, and if it was discriminatory in intent, it will only be repealed when discrimination ceases.

It is much too late in the game to trot out such makeweights as actually bearing upon the intent and effect of Article I, §26. No alternative programs appeared on the ballot with Proposition 14, or in the ballot argument, or were otherwise proposed to the voters. Proposition 14 presented not a change in tactics, but a revision of the fundamental public policy of the state. This is admitted even in the dissenting opinion of Justice White of the California Supreme Court. See *Mulkey v. Reitman*, 64 A.C. 557, 586 (dissenting opinion). Any theoretical palliative now advanced must cope not only with its own inadequacies, but with the countervailing force exerted by the declaration of right promulgated by Article I, §26.

By proscribing *all* means of carrying out California's previously established public policy against racial discrimination by the owners of residential real property, Article I, §26 demonstrates that it is not concerned with means. Article I, §26 thus makes clear by its own

terms that it was not the *means,* but rather the *ends* of California's public policy against discrimination in housing that it was intended to affect. Whether the intent and effect of Article I, §26 was only to handicap state government in its efforts to achieve desegregation, or to render such efforts completely impossible, its legal significance in the same.

III.

ARTICLE I, SECTION 26 OF THE CALIFORNIA CONSTITUTION VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE (1) IT REQUIRES ABDICATION OF GOVERNMENTAL RESPONSIBILITY SO AS TO PERMIT THE PERPETUATION OF RESIDENTIAL SEGREGATION BASED UPON RACE AND (2) IT AFFIRMATIVELY ACTS TO ENCOURAGE AND PROMOTE RACIAL DISCRIMINATION IN THE HOUSING MARKET.

Once Article I, §26 of the California Constitution has been examined in its social, legal, and historic context, and its purpose and result have been established, it becomes a much simpler task to determine whether it violates the Fourteenth Amendment to the United States Constitution.

Article I, §26 now fits easily within traditional and established theories which have evolved from cases dealing with racial discrimination. It thus becomes unnecessary to explore the difficult and as yet unanswered questions involving the scope of a state's affirmative obligations under the Fourteenth Amendment, and the means available for fulfilling those obligations.

Article I, §26 denies to persons in California the equal protection of the laws because (1) it requires abdication of governmental responsibility so as to permit the perpetuation of residential segregation based upon race and (2) it affirmatively acts to encourage and promote racial discrimination in the housing market.

A. Article I, Section 26 of the California Constitution Is Prohibited State Action in Violation of the Fourteenth Amendment to the United States Constitution Because It Abdicates Governmental Responsibility so as to Permit the Perpetuation of Residential Segregation Based Upon Race.

Article I, §26 masquerades as an extension of traditional protections afforded to property, complementing the guarantees of the federal Constitution. But the costume is ill-fitting one.

Article I, §26 does not complement, but rather conflicts with, the Fourteenth Amendment to the United States Constitution. It represents not an extension of existing guarantees, but the creation of a new right completely alien to our constitutional traditions: a private right to discriminate on the basis of race, color, religion, national origin, or ancestry which exists as an imperative absolute—without qualifications, without exceptions, and without limits—binding the state where national public policy and the health and safety of its citizens require that it remain free to act.

The concept of absolute individual discretion is alien not only to the traditions of American democracy, but to the very concept of organized society:

> ". . . neither property rights nor contract rights are absolute; for government cannot exist if the

> citizen may at will use his property to the detriment of his fellows or exercise his freedom of contract to work them harm." *Nebbia v. New York,* 291 U.S. 502, 523.

Even the absolute terms of the First Amendment do not afford such absolute protection to individual behavior. The guarantee of free speech does not protect utterances which are libelous or obscene. *Beauharnais v. Illinois,* 343 U.S. 250 (1952). Neither do guarantees of religious freedom protect all behavior springing from religious belief. *Reynolds v. United States,* 98 U.S. 145 (1878).

The constitutional protection of property, on the other hand, is not even expressed in absolute terms. See United States Constitution, Fifth Amendment, Fourteenth Amendment; California Constitution, Art. I, §13.

> "Property like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. . . . property, like every other social institution has a social function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another." Cardozo, *The Nature of the Judicial Process,* pp. 87-88.

It is true that, under our law and legal traditions, a man's home may be his sanctuary. *Cf. Lombard v. Louisiana,* 373 U.S. 267, 343 (1963) (concurring opinion). But the attack here is on regulation of the house that is not a home, but a commodity which has been placed upon the open market. Is a man's interest in who buys his house superior to his interest in who buys other property which he offers up for sale, whom he

hires in his shop, or whom he serves in his restaurant? Do the sale of residential real property and the rental of housing accommodations so differ from all other businesses that they must be accorded a privilege enjoyed by no other business in California? What justification other than resistance to integrated neighborhoods offers itself for this exemption from the standards made applicable to all other business transactions by Civil Code §§ 51-52?

The proponents of Proposition 14 asserted that Article I, §26 was merely a declaration of governmental neutrality:

> "Your 'Yes' vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another." *Proposed Amendments to Constitution,* p. 18.

But this concept of government "neutrality" is a myth which will not stand the test of its own logic.

The enforced neutrality of government embodied in declarations of right exists for the purpose of permitting the exercise of that which is protected from interference. Thus the First Amendment to the United States Constitution, through preventing interference with the expression of ideas and religious belief, permits the free exercise of speech and religion. In the same way, Article I, §26 of the California Constitution acts to permit racial discrimination where it otherwise could not exist.

Where the purpose of a state's abdication of its traditional responsibility to regulate elections for public office is to permit racial discrimination by private associations which effectively hampers voting rights, such

conduct will violate the Fifteenth Amendment even though, arguably, no state action is involved. *Terry v. Adams,* 345 U.S. 461 (1953); *Baskin v. Brown,* 174 F. 2d 391 (4 Cir., 1949); *Rice v. Elmore,* 165 F. 2d 387 (4 Cir., 1947). No election machinery may be sustained if its purpose or effect is to deny Negroes on account of their race an effective voice in the governmental affairs of their county, state, or community. *Terry v. Adams* at 466.

Abdication of responsibility to educate with the purpose of permitting private associations to discriminate will be treated in the same way. *Griffin v. School Board,* 377 U.S. 218 (1964). Such an attempted abdication of governmental authority in order to permit racial discrimination by others theoretically outside the scope of the Fourteenth Amendment will not be allowed to thwart the Amendment's command.

Most recently, in *Evans v. Newton,* 382 U.S. 296 (1966), this Court struck down a city's attempt to free itself of responsibility for management of a public park so that the discrimination forbidden to it as a public agency could be carried on by private citizens. A striking parallel exists between the pattern of conduct which gave rise to the decision in that case, and the pattern of conduct which emerges here.

For years, the City of Macon had regulated and supervised the park and its activities, just as, for years, the State of California has regulated and supervised the sale and rental of real property. For years, the City of Macon had exercised its authority so as to foster and promote a policy of racial segregation. Similarly, for years, the State of California exercised its authority so as to foster and promote residential segrega-

tion based upon race. California lent the aid of its courts to those who coerced residential segregation through restrictive covenants, and permitted those whom it regulated in the interest of public health and safety to breed crime, disease and immorality through denying others access to housing solely on the basis of race.

Both the City of Macon and the State of California then reversed their prior policies, and in both cases the response was the same: an attempt to force government to relinquish its regulation of the facility or activity involved so as to permit the segregated patterns of the past to continue.

It may be argued that the cases referred to above are clearly distinguishable from the instant case because they involve traditional governmental functions. But such an argument ignores the scope of Article I, §26, which strikes not at particular incidents of the state's police power manifesting themselves in specific pieces of legislation, but at the very ability of the state to regulate at all.

> ". . . the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and . . . a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles." *Truax v. Corrigan*, 257 U.S. 312 (1921).

Article I, §26 has stripped the State of California of its power to protect the public health and safety, and

the public morals, in an area of legitimate and significant governmental concern. It is this power itself, and not merely its exercise, which has been affected. The existence of power encompasses the discretion not to use it, as well as to determine the manner in which it shall be used. The exercise of that discretion is a matter of vital local concern. The existence of that discretion is also a matter of basic constitutional right.

What this Court said in another context, many years ago, remains equally pertinent today:

> "No legislature can bargain away the public morals. The people cannot do it, much less their servants. The supervision of . . . these subjects of governmental power is continuing in nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." *Stone v. Mississippi,* 101 U.S. 814, 819 (1880).

Article I, §26 represents an enforced abdication of governmental authority in an area of legitimate governmental concern. The determining factor in evaluating the state's action, and determining its consistency with Fourteenth Amendment guaranties, should not be the nature of the function which is abdicated, but rather the purpose of the abdication and the results which flow from it. If a state acts to divest itself of its power to govern, and does so with the intent and effect of achieving a deprivation of constitutional guarantees,

then the act of withdrawal itself must be found an unlawful exercise of the state's power.

The fact that the state acted in response to the desires of a majority of its citizens does not affect these conclusions. Fundamental right may not be infringed simply because a majority of the people choose to do so, and no plebiscite can legalize an unjust discrimination. *Lucas v. Forty-Fourth General Assembly,* 377 U.S. 713, 736-7 (1964). Our government—both state and federal—remains bound by those restrictions beneficently imposed by the Constitution of the United States. It must be so bound whether it acts in response to the popular will or a willful few. This is the fundamental principle of a constitutional system of government.

So long as government retains the power to govern, its failure to act, or to act in a particular manner, may find justification. It may represent a judgment as to the gravity of a problem, or the desirability of action at a particular historical moment. It may reflect a judgment as to the appropriateness of particular means to the desired ends. It thus may be considered a proper exercise of legislative discretion on political questions which should remain free from judicial interference. But when the very power to make judgments is abdicated, and that abdication occurs for the express purpose of preventing those judgments from being made, then the state has sufficiently involved itself in the private activity which results to be in violation of the Fourteenth Amendment.

B. Article I, Section 26 of the California Constitution Is Prohibited State Action in Violation of the Fourteenth Amendment to the United States Constitution Because It Affirmatively Acts to Encourage and Promote Racial Discrimination in the Housing Market.

A state cannot be held responsible under the Fourteenth Amendment for private acts of racial discrimination with which it has no connection. *Civil Rights Cases,* 109 U.S. 3 (1883). But neither may a state facilitate, encourage, or promote such discriminatory conduct. Thus, in *Barrows v. Jackson,* 346 U.S. 249, 254 (1952), the court refused to award damages in a civil suit against the violator of a private agreement because, "The result of that sanction by the state would be to encourage the use of restrictive covenants."

In *Lombard v. Louisiana,* 373 U.S. 267 (1962), the court found prohibited state action in public statements made by the mayor and superintendent of police of New Orleans. No state law or local ordinance required segregated facilities. Nowhere in their statements did the mayor or superintendent mention government support of segregated facilities. There were only declarations of intent to preserve order and protect the public health and safety. In context, however, the effect of these statements was to encourage the perpetuation of segregated facilities by private parties through making clear that acts of private discrimination would have the support of public authority.

A crucial factor is the interplay of governmental and private action in light of private attitudes and pressures existing in the community. In *Anderson v. Martin*, 375 U.S. 399 (1964) this Court struck down a requirement that the race of candidates appear with their names on the ballot because the effect of the requirement was to encourage private acts of discrimination. In that case no act of the state, standing alone, would violate constitutional rights. In light of the surrounding circumstances, however, there was a facilitation and encouragement of private acts of discrimination. It was this result which made the state action objectionable.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), a court order requiring the production of the local membership lists of the NAACP was held an unconstitutional interference with freedom of association. The court said (p. 463):

> "It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures."

The Court looked to the circumstances surrounding an otherwise permissible act of state government to determine its intent and effect. Taken in the context of local custom and private attitude, the act stood revealed as an act of incitement to retaliation which violated the constitutional guarantees of the Fourteenth Amendment.

Taken in the context of local custom, private attitude, and community understanding, Article I, §26 of

the California Constitution encourages and facilitates private acts of discrimination. It thereby assumes those same characteristics which invalidated the theoretically neutral action of the state in the above cases.

Article I, §26 is more than a negative declaration singling out a particular area as inappropriate for governmental regulation. It was deliberately worded as an affirmative declaration of right: the "right" of absolute individual discretion in the sale or rental of residential real property.

This "absolute discretion" has been enshrined in Article I, the Declaration of Rights of the California Constitution, along with the rights to freedom of speech, religion, and the press; the right to trial by jury; the right to assemble and petition; and the right to due process. It is made inviolate: no arm of the state can interfere with it.

The full force of the Constitution of California is thereby placed behind the practice of racial and religious discrimination in the sale and rental of residential real property and the perpetuation of segregated housing, with its attendant problems of crime, disease, and immorality, *de facto* segregation in the public schools, limited job opportunities, and second-class citizenship. By proclaiming that legislation against such discrimination is a violation of fundamental right, the proposed constitutional amendment clearly implies that such conduct is indeed proper.

Such a constitutional amendment does not simply neutralize governmental efforts to cope with the problems of segregated housing. It serves to crystalize opposition to integrated neighborhoods, no matter how

achieved. When a right is declared, conduct in accordance with that right is encouraged. When interference with a custom is declared wrong, that custom is reinforced. This is especially true when the custom is as widespread and deeply ingrained as the custom of residential segregation based upon race.

Article I, §26 affects an area of human behavior where community attitudes and local pressures have great influence on individual behavior. Under such circumstances, enforced government abdication is far worse in its effect than governmental inaction. Such abdication can only signify that the battle between public interest and private prejudice has already been fought —and lost. Many who would otherwise obey the dictates of the law—or in the absence of the law the dictates of their conscience—will yield to the community expression of proper conduct in the disposition of residential real property. When that community expression is embodied in an amendment to the state Constitution, it becomes state action encouraging and facilitating private discrimination which is prohibited by the Constitution of the United States.

In the deceptiveness of its language, Article I, §26 is a sophisticated means of discrimination. In its purpose, intent, and effect it is as brutally unsophisticated as a slammed door. It is a disabling blow to the Constitution of California, and an overt declaration of hostility to the principles proclaimed by the Constitution of the United States. It cannot be permitted to stand.

SUMMARY OF ARGUMENT.

The enactment of Article I, §26 of the California Constitution clearly represented state action. The question for decision before this Court is whether it represented state action of a type prohibited by the Fourteenth Amendment to the United States Constitution.

In order to find that Article I, §26 violates the Fourteenth Amendment, it is not necessary to demonstrate a connection between it and the specific act of discrimination perpetrated against plaintiffs and respondents herein. Rather, it is possible to find that the enactment of Article I, §26 was *per se* unlawful. This can be done by demonstrating that the purpose and result of the enactment of Article I, §26 was the perpetuation of invidious racial discrimination.

If the purpose and result of Article I, §26 was the perpetuation of racial discrimination, then it is void as a violation of the guarantees of equal protection provided by the Fourteenth Amendment. If it is void, then it can no longer stand as a barrier between respondents and their right to the relief from private acts of discrimination provided under the laws of California. Respondents would then be entitled to relief from those private acts of discrimination, not because they were unlawful under the Fourteenth Amendment, but because Article I, §26 was unlawful under the Fourteenth Amendment, and therefore could not act to nullify the remedy for private acts of discrimination which the state had provided.

The social, legal, and historical context in which Article I, §26 was enacted clearly demonstrates that it had as its purpose and result the perpetuation of residential

segregation based upon race. California's cities clearly evidence a widespread and deeply ingrained custom of residential segregation based upon race. This custom of residential segregation has, in the past, been fostered and promoted through the policies and practices of state agencies and individuals subject to state regulation. While comprehensively regulating the business activities of real estate brokers and housing builders and developers, the state ignored the blatant and outspoken efforts of these industries to maintain segregated communities. In addition, the state acted to place its own power and prestige behind these discriminatory practices through the enforcement of racially restrictive covenants.

The national public policy against racial discrimination, and the detrimental effects of residential segregation upon the public welfare, health and safety, ultimately led to a reversal of California's prior practices. The result was the adoption of a public policy against discrimination in the housing market, affirmatively implemented through state legislation and judicial relief.

Article I, §26 was a direct response to the state's efforts to prohibit racial discrimination from occupying a place in the housing market, because the implementation of these efforts threatened the perpetuation of segregated housing. It was more than simply a reaction to the particulars of statutory procedure or judicial decision. It was a response to the very concept of government interest in the elimination of residential segregation. Its intent and effect was not only to nullify governmental action already taken, but to free completely those who discriminated on the basis of race from the threat of further or future restrictions.

Once examined within its social, legal, and historical context, the true intent and effect of Article I, §26 thus become clear. First, it acts to require abdication of governmental responsibility so as to permit the perpetuation of residential segregation based upon race. Such an enforced abdication of governmental authority, in an area of legitimate governmental concern, is a violation of the guarantees of the Fourteenth Amendment. If a state acts to divest itself of its power to govern, and does so with the intent and effect of achieving a deprivation of constitutional guarantees, then the very act of withdrawal becomes a prohibited state action, and is void.

The enactment of Article I, §26 also violated the Equal Protection Clause of the Fourteenth Amendment because it acted to encourage and promote racial discrimination in the sale and lease of real property. Article I, §26 is without the appearance of coercive force. But coercive force is not a necessary attribute of state action under the Fourteenth Amendment, if the state action serves to encourage private acts of racial discrimination.

This Court has looked to the interplay of governmental and private action in light of private attitudes and pressures existing in a community, as well as to the governmental act itself. Taken in the context of local custom, private attitude, and community understanding, Article I, §26 of the California Constitution encourages and facilitates private acts of racial discrimination. It is therefore void under the Fourteenth Amendment to the United States Constitution.

CONCLUSIONS.

For the foregoing reasons, the Supreme Court of the State of California was correct in its decision that enactment of Article I, §26 of the California Constitution was a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and that Article I, §26 was void in its general application. The decision of the Supreme Court of California should therefore be affirmed.

Respectfully submitted,

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EXHIBIT A.

TIMES EDITORIALS

Decision on Housing Initiative

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

That, in essence, is an initiative amendment to the State Constitution upon which Californians will be asked to vote Yes or No this year.

Petitions to place it on the ballot are now circulating throughout the state. It doubtless will go before the electorate in November.

Acts Would Be Nullified

Immediate effect of this proposed amendment, if ratified by a majority of the voters, would be to nullify portions of the Rumford Act (relating to discrimination in housing) and the Unruh Act (dealing with real estate brokers).

Under the Rumford Act, owners of "any publicly assisted housing accommodation," whether multiple or single dwelling, cannot refuse to sell or rent to any person solely because of his race, color, religion, national origin or ancestry. (This Rumford Act provision includes housing constructed under state or federal loans. Although the proposed amendment would repeal this provision as it applies to housing constructed under state loans, it cannot affect housing constructed under federal loans, so long as the existing Presidential directive remains in effect.)

Further, the Rumford Act applies to all dwellings "containing more than four units," meaning apartment houses, even if the owner acquired them without such public assistance. The proposed initiative amendment also would repeal this provision.

Aware that the public is divided almost evenly on the proposed amendment, according to recent polls, The Times has pondered the issue for weeks seeking an editorial judgment based on principle.

During an extensive series of editorials last June, when the issue burned hottest in Los Angeles, The Times urgently espoused the granting of all minority rights guaranteed under the U.S. Constitution, and specifically urged the implementation of equality in education and employment.

But on a third basic subject The Times said: "One of man's most ancient rights in a free society is the privilege of using and disposing of his private property in whatever manner he deems appropriate."

Moreover: "We do not question the good faith of those who would abrogate this privilege. But we do feel, and strongly, that housing equality cannot safely be achieved at the expense of 'still another basic right."

Men of good will, certainly the vast majority of Americans, agree that the privilege of living wherever one's economic means permit is a desirable thing, and one which would ultimately eliminate the housing stresses that plague the minority segments of our citizenry. We consider it morally wrong to deny such housing to anybody, regardless of race, color or creed.

But artificial laws designed to hasten the process of social, as distinct from civil, justice can only exacerbate the situation—and, in the opinion of The Times, defeat their very purpose. Discrimination will disappear only when human prejudice succumbs to human decency.

The philosophical fallacy of the Rumford Act, unhappily, lies in seeking to correct such a social evil while simultaneously destroying what we deem a basic right in a free society.

Principle Backed

The Times agrees with the principle, expressed in regulations dealing with federally subsidized housing and reiterated in the Rumford Act, that housing created by assistance which derives from all the people should be equally available to all the people. As noted, this proposed amendment does not affect this principle as it applies to federally-assisted housing.

We would rather that the proposed amendment, under this principle, also exempted state-assisted housing. But it does not, and to this extent The Times believes the proposed amendment is defective.

The Times would have preferred an initiative that simply repealed present legislation which impairs the basic right of using and disposing of private property in whatever manner its possessors deem appropriate, and excepting only that which was acquired with "public assistance." Such a vote could have elicited the opinion of California citizens without writing an amendment into the State Constitution.

These preferences, however, are not before the electorate. The choice lies between the social aspirations of the Rumford Act and the fundamental rights of private property which the proposed initiative would restore.

In this circumstance, and on balance, The Times believes the amendment should be approved.

WHY SHOULD THE INITIATIVE CONSTITUTIONAL AMENDMENT BE ADOPTED?

The Initiative Constitutional Amendment to Protect Property Rights must be adopted to preserve your rights as a property owner. Any law should be repealed which says it is a "crime" for you to rent or sell your property to a person of your own choosing.

HEAVY FINES

Here is an example of the forced housing law in action:

A San Francisco jury recently awarded a $1,250 judgment against a property owner for the "crime" of refusing to rent his apartment to a Negro whom he considered to be an undesirable tenant. The case against the property owner was filed under the housing provisions of the Unruh Civil Rights Act, which this Initiative would repeal.

How would you like to pay such a fine for the "crime" of selecting your own tenant?

UNJUST CHARGES

A great many cases against property owners have already been filed with the FEPC under the provisions of the Rumford Act. An accused property owner is subjected to government inquisition, orders, penalties, and in some cases heavy fines.

The experience record of the FEPC shows that 65 percent of the cases filed with it (since its adoption in 1959) have been dismissed as unjust complaints. Yet the law provides for free legal counsel and government assistance for any person filing a complaint.

THE LAW MAKES NO PROVISION FOR DAMAGES FOR THE PROPERTY OWNER WHO IS UNJUSTLY ACCUSED.

WHERE IS THE FAIRNESS IN SUCH A LAW?

THERE IS NO CONFLICT BETWEEN HUMAN RIGHTS AND PROPERTY RIGHTS

Human rights and property rights are not severable.

People give property its value.

Every person of good will approves of ample housing accommodations for every American, but this objective must be achieved without destroying the property rights of the individual citizen.

We must remember that majorities as well as minorities have rights.

Harmonious intergroup relations are based on good will and human understanding. They are not based on government force and compulsion.

PROTECT YOUR HOME

VOTE "YES" ☒

INITIATIVE CONSTITUTIONAL
AMENDMENT TO PROTECT
PROPERTY RIGHTS

COMMITTEE FOR HOME PROTECTION
L. H. Wilson Robert Snell
609 S. GRAND AVE., LOS ANGELES, CALIF. 90017

PROTECT YOUR HOME . . .

VOTE "YES"

INITIATIVE CONSTITUTIONAL AMENDMENT TO PROTECT YOUR PROPERTY RIGHTS

". . . It is fundamental that in our democratic society, the rights the people have reserved to themselves must always be jealously guarded."

Judge Irving H. Perluss

★★★★★★★★★★★★★

WHAT IS THE INITIATIVE CONSTITUTIONAL AMENDMENT TO PROTECT PROPERTY RIGHTS?

The official title of the Initiative measure reads as follows:

SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. INITIATIVE CONSTITUTIONAL AMENDMENT. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels, and similar public places.

The proposed Initiative Constitutional Amendment will restore the right of property owners to sell, lease, or rent their real property to persons of their own choosing. This constitutionally guaranteed right has been partially taken away from you by recently enacted laws in California.

The Initiative will outlaw forced housing. It will guarantee in plain and simple language the right of any property owner to sell, rent, or lease all or part of his property to any person he chooses.

★★★★★★★★★★★★★

★★★★★★★★★★★★★

IS THIS INITIATIVE CONSTITUTIONAL?

The Initiative Constitutional Amendment to Protect Property Rights is constitutional.

Article I of the Constitution of California says: "All men ... have certain inalienable rights, among which are those of ... acquiring, possessing, and protecting property ..."

The right of the people to initiate legislation is clearly guaranteed by California's Constitution.

Article IV of the Constitution says:

> The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.
>
> The first power reserved to the people shall be known as the initiative.

Some groups, who apparently have little understanding of our democratic principles, have sought to deny the people their right to vote on this Initiative Constitutional Amendment.

In denying their application for a preliminary injunction, Judge Irving Perluss of Sacramento said:

> "... It is fundamental that in our democratic society, the rights the people have reserved to themselves must always be jealously guarded."

IT IS NEVER UNCONSTITUTIONAL FOR THE PEOPLE TO EXERCISE THEIR CONSTITUTIONAL RIGHTS.

★★★★★★★★★★★★★

★★★★★★★★★★★★★

WHAT LAWS WOULD THE INITIATIVE CONSTITUTIONAL AMENDMENT REPEAL?

The Initiative Constitutional Amendment to Protect Property Rights would repeal the Rumford Forced Housing Act and the provisions of the Unruh Civil Rights Act which interfere with the rights of private property owners.

Essentially, the Rumford Act says that a home owner must not refuse to sell, rent, or lease his property on the basis of race, color, creed, or national origin.

This means that the home owner can be punished and fined if he insists on selling or renting his own residential real property to someone of his own faith, or his own race, instead of someone of a different race or faith. The American right of freedom of choice is taken away by this act. In the place of freedom of choice is substituted forced housing.

The Rumford Act has provided an open season on the home owners for forced housing witch hunters.

Under the Rumford Act, the so-called Fair Employment Practices Commission hears cases and the property owner has the right to appeal FEPC decisions to the courts. If the courts rule against the owner and he refuses to obey the decision, the property owner can be held in contempt of court. One of the possible punishments in contempt proceedings is imprisonment. This is a heavy price to pay for the "crime" of renting or selling your property to a person of your own choosing.

★★★★★★★★★★★★★

READ THE AMENDMENT ☆☆☆☆☆☆☆☆☆☆☆☆

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable.

NOW YOU KNOW IT RESTORES YOUR FREEDOM—VOTE 'YES' #14 NOV. 3

Your 'YES' Vote on Proposition #14 will

- ☆ Restore your Freedom to Sell or Rent your Property to Anyone You Choose
- ☆ Stop Police State Practices
- ☆ Promote Friendly Community Relations
- ☆ Restore Constitutional Protection to Homeowners
- ☆ Eliminate Tyranny of a Bureaucratic Commission
- ☆ Remove Risk of Heavy Economic Losses

COMMITTEE FOR YES ON PROPOSITION #14
TO ABOLISH RUMFORD FORCED HOUSING ACT

609 SOUTH GRAND AVENUE
LOS ANGELES 17

703 MARKET STREET
SAN FRANCISCO 5

HOWARD L. BYRAM, STATE CHAIRMAN

CALIFORNIANS SHOULD HAVE ☆ FREEDOM ☆☆☆☆☆ OF ☆☆☆☆☆☆☆☆☆☆ CHOICE ☆☆☆☆☆☆

WHY 'YES' ON PROPOSITION #14?

YES Vote Will **restore** to California property owners the right to choose the person or persons to whom they wish to sell or rent their residential property.

YES Vote Will **abolish** those provisions of the Rumford Forced Housing Act of 1963 which took from Californians their freedom of choice in selling or renting their residential property.

YES Vote Will **amend** our California Constitution so that the only way future legislation could take away the freedom of choice in selling or renting of residential property would be by vote of the people.

YES Vote Will **halt** the State Fair Employment Practices Commission's harassing and intimidating the public and property owners in the exercising of their freedom of choice.

YES Vote Will **end** State police power over the selling or renting of privately owned residential property.

YES Vote Will **restore** rights basic to our freedom—rights that permit all persons to decide for themselves what to do with their own property.

That Long, Long Arm of the Law—

The Rumford Forced Housing Act's police arm is long and strong.

It can reach almost any Californian—almost anyone who owns or rents a place to live. Owner. Tenant. Yes, and neighbor, too!

First, it reaches the owner. It takes away his right to choose his tenants or buyers.

Then it takes away a tenant's or buyer's right—the right to choose his neighbors.

If the owner insists on his freedom to choose, the long arm can reach out and make him pay a complainant up to $500; and further insistence by the owner can make him subject to contempt of court penalties.

If a tenant advises the owner to use freedom of choice, the long arm can reach the tenant with the same penalties.

In the matter of giving advice, even the neighbor must beware. That same long arm can put the neighbor in the same penalty box as the tenant!

14 SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. INITIATIVE CONSTITUTIONAL AMENDMENT. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels, and similar public places.

YES	X

OWNERS! TENANTS! NEIGHBORS!

GET BACK YOUR RIGHTS!

VOTE "YES" ON PROPOSITION #14

SOME QUESTIONS AND ANSWERS DEMONSTRATING THE NEED FOR A "YES" VOTE ON PROPOSITION 14

1. What is Proposition 14?

Proposition 14 is a proposed initiative amendment to the California Constitution. It earned its place on the November 3 ballot when unpaid volunteers from all parts of the state obtained 633,206 valid signatures on petitions, thus giving the people an opportunity to vote on the proposition.

2. What does Proposition 14 propose to do?

Proposition 14 proposes to abolish those provisions of the Rumford Forced Housing Act which have taken away from California residential property owners their right to choose the person or persons to whom they may wish to sell or rent their property.

3. How would Proposition 14 do this?

A "Yes" vote for Proposition 14 would restore to the property owner his right of choice in disposing of his property, by causing to be placed in our State Constitution, the following language (quoting the essential paragraph of the amendment protecting the property owner):

"Neither the State, nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

4. Why is such a Constitutional Amendment necessary?

It is necessary because in the closing hours of the 1963 session of the Legislature the Rumford Forced Housing Act was rammed through and became a law on September 20, taking from the property owner his freedom of choice in disposing of or renting his property.

5. Why does it take a Constitutional Amendment to restore to the property owner the right to choose his purchaser or tenant, rather than to have a referendum repeal?

The Constitutional Amendment is necessary so that never again can the legislature, under political pressure and coercion, enact such a measure without first referring it to a *vote of the people.* Otherwise, if the Rumford Forced Housing Act were merely repealed by a referendum vote, a future legislative session could re-enact such objectionable legislation.

6. Briefly, how does the Rumford Forced Housing Act take from the property owner his freedom of choice in selling or renting his property?

The Act provides, in effect, that if a property owner is charged with refusing, on alleged religious or racial grounds, to sell or rent property he has on the market, he can be forced to appear before the Fair Employment Practices Commission and prove his innocence of the charges. The person making the charge does not have to go to court and file a complaint against the owner—he merely files it with the FEPC.

If the FEPC concludes the complainant is justified in his charges, then it can force the property owner to do one of three things, specified in the Act as follows:

(1) Sell or rent the housing accommodation in question to the aggrieved person, if the property is still available.

(2) Sell or rent a like accommodation, if one is still available, or the next vacancy in a like accommodation.

(3) Pay damages to the aggrieved person in an amount not to exceed $500, if the FEPC determines that neither of the remedies under (1) or (2) is available.

If the FEPC commissioner assigned to the case believes the owner has violated the Rumford Forced Housing Act, he may tie up the owner's property for sale or rental by bringing an action in Superior Court to restrain the owner from selling or renting until the commission has completed its investigation and made its determination, which must be done within 20 days.

Under the provisions of this act, legal maneuverings by the commission's attorneys could tie up an owner's property for a considerable length of time.

7. How does the FEPC proceed against a property owner when a charge of discrimination has been filed?

The charge is referred to a member of the commission. An investigator is sent out to interview the owner. If the owner cannot convince the investigator that he is innocent, and if the assigned commissioner believes "that probable cause exists for believing the allegations of the complaint, he shall immediately endeavor to eliminate the alleged practice (by the owner) by conference, conciliation and persuasion" (quoting from the Rumford Act).

If the owner still resists the charge, an accusation is filed against him and he is forced to appear at a hearing. Eventually, contrary to statements by official proponents of the Act that there is no punitive action provided for in the Act, the commission may, if it considers the owner guilty, order him to pay the "aggrieved person" not to exceed $500. (See again question No. 6.) The owner may appeal to the courts from the findings and orders of the commission but cannot get a jury trial on the issue in dispute.

8. When the owner takes his case to court, does he and does the one filing the complaint have attorneys to handle their case?

The owner would be foolish not to retain counsel, but the party complaining is represented by the State of California in the role of counsel for the FEPC.

9. Can the FEPC take the accused into court?

Yes, if the accused violates the commission's order, the commission may ask a Superior Court to enforce the order, and the violator then is subject to contempt of court, for which he could be sent to jail, if he violates a court order.

10. What is the Fair Employment Practices Commission?

The FEPC was created by the Legislature about five years ago for the purpose of handling the problems of alleged discrimination in hiring practices in the state because of race, religion, or national origin. This lies in the field of the so-called minority groups. It should be pointed out that the members of the commission are political appointees of the governor. No governor would appoint anyone to such commission who was not either a member of or very sympathetic to minority groups, particularly those groups highly active and vocal in the field of so-called civil rights. Furthermore, such commission would not be likely to have as objective an approach to a case involving alleged racial discrimination as would a judge presiding in a case before the court.

11. Some provisions of the Rumford Forced Housing Act apply to "Publicly assisted housing." What does that mean?

"Publicly assisted housing" means housing Federally insured through the FHA, or Veterans' Administration, or the California Veterans' loans, for the main part. There are minor definitions. It is estimated that the Rumford Forced Housing Act affects about 70 per cent of the residential property in the state, including apartment rentals.

12. Are all residential rental units affected by this Act and how do persons who rent feel about it?

All rental units of five or more on a property are affected and it is the experience of owners of such units that their tenants are, for the most part, in favor of Proposition 14 abolishing the Rumford Forced Housing Act.

13. Some argue that this amendment to the Constitution would halt urban renewal projects in the state. Is this true?

No. Contrary to what some say, the amendment does not interfere with the right of the state or federal government to enforce contracts made with private parties. This would include federal urban renewal projects, college housing programs and property owned by the state or acquired by condemnation. Simply said, the amendment would restore the law to what it was before enactment of the forced housing laws. Urban renewal was going

on before those laws were passed. There is no reason why urban renewal should not continue after those laws are abolished. In 40 or so other states the property owner is free to sell or rent his property to persons of his choice. The federal government has not withheld urban renewal funds in those states. Withholding urban renewal funds is just campaign "scare talk."

14. Will this initiative Constitutional Amendment prevent property owners from selling or renting their property to persons of minority groups?

NO! If Proposition 14, this amendment, is approved by the voters, any property owner can sell or rent his property to anyone he sees fit to deal with, regardless of race, color, religion, or national origin.

15. How do people generally feel about this Constitutional Amendment—Proposition 14—on the November ballot?

Every public opinion poll taken on this question since the Rumford Forced Housing Act was passed has shown that a very substantial majority of the people are opposed to the Act and are for its abolition as proposed in Proposition 14. As a matter of fact, the polls show that as time has passed since the enactment of the Rumford Forced Housing Act, the percentage of those opposed to the Act and in favor of abolishing it has increased.

16. Why is a "YES" vote needed on Proposition 14?

The Rumford Forced Housing Act has taken from the California property owner his fundamental right of freedom to choose those to whom he wishes to sell or rent his property. Passage of Proposition 14 would restore that right.

17. How will passage of Proposition 14 affect owners of property carrying FHA and GI Veteran loans?

Proposition 14 will restore freedom of choice to such owners, thus removing the unfair limitations placed on them for having obtained mortgage financing if such freedom was not restricted when the loan was obtained.

18. How are hotels and motels affected by the Rumford Forced Housing Act?

They are not affected. All hotels and motels and places of public accommodation are specifically excluded from both the Rumford Forced Housing Act and Proposition 14.

19. Why are some properties bound by the Rumford Forced Housing Act while others are not?

The reasoning behind this discrimination can not be justified. If the principle were sound, it should apply to owners of all home and residential properties.

20. How is the average home owner or owner of rental property going to know for sure whether his property is covered by the Act or not?

The only certain way is to hire a lawyer. This is one of the reasons the Act is unreasonable. Any law that affects directly millions of people and perhaps makes them liable to penalties should be simple and understandable to the layman.

21. What if a property owner has been wrongly accused of discrimination and proves his innocence. Who pays his lawyer and other expense of defending himself?

He does. He must bear all of the expense of defending himself—win or lose.

22. If an apartment is rented to a person of a minority group and other tenants move out, can an owner collect from the State for loss of income or even loss of the property if mortgage payments are not kept up because of this situation?

No. The property owner has to bear all of the risk and all of the loss.

23. What effect will the Federal Civil Rights Act of 1964 have upon the State constitutional amendment, Proposition 14?

None. There is no conflict between the two.

24. We have laws regulating property, such as zoning and health and safety restrictions. Isn't the Rumford Forced Housing Act just one more property regulation?

No., Zoning, health, safety, etc., restrictions are on the property only. Under the Rumford Forced Housing Act, the State has power to force one private citizen to make a contract with another private citizen. This is entirely different than the code restrictions on property.

Here is how Proposition 14 will be identified on the ballot November 3, 1964

"SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. INITIATIVE CONSTITUTIONAL AMENDMENT. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, and similar public places."

★ ★ ★ ★ ★

A "Yes" Vote will add this wording to the California Constitution:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article 1, Sections 14 and 14½, of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this Article are severable.

petitions. The Association withheld support on grounds that the referendum would repeal only the Rumford Act, that the Legislature could pass another such act at a future session, and that local governmental bodies such as cities and counties would still be free to propose and adopt any such legislation they cared to. The referendum failed to collect the required number of signatures in the time allotted by law.

BIRTH OF THE INITIATIVE

In August, 1963, The California Real Estate Association, California Apartment Owners Association, and homebuilder groups agreed that an initiative constitutional amendment restoring the property owner's freedom of choice, was a necessity. The power of initiative is provided under Article IV, Section 1 of the California Constitution:

"The Legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

"The first power reserved to the people shall be known as the initiative."

When the California Real Estate Association met in convention in September, the assembly of a thousand directors approved almost unanimously a motion to support a committee formed to place the initiative before the people at the next general election.

The essential paragraph of the initiative measure reads:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The initiative measure expressly applies only to residential housing and does not disturb provisions in California Law which forbid discrimination in public accommodations such as hotels and motels, or in businesses.

It does not affect the laws of contract, except to restore freedom of consent to both parties. This means that it cannot, as some claim, supercede clauses in FHA or other federal government contracts prohibiting discrimination, such contracts having been freely entered into by both parties.

Approval of the initiative measure will insure that any legislation in the future which would abridge the freedom of choice of the individual as defined in the amendment must first be submitted directly to the electorate for a vote.

The net effect of the initiative is to return California law, as it affects residential property, to its status before 1959. It provides that all citizens, which would include minority group members, shall have equal freedom to acquire, sell or rent property.

ARGUMENTS OF THE OPPOSITION

1. A common argument against the initiative measure is that the Rumford Act should be given a chance to see if it will work. The question is not whether it will work, but whether it is an unwarranted infringement on freedom of choice. Should we as well give up freedom of speech, for instance, to see if we get used to going without it?

2. Another argument says that the initiative is designed to further religious and racial discrimination. It does no such thing. It provides equality under law for all citizens, leaving the moral issue of religious and racial discrimination to be resolved by individuals, not by legislative force.

3. The opposition contention that the initiative is discriminatory has brought their challenging voices into the courts.

In January, 1964, opponents requested a superior court in Sacramento to enjoin county clerks from accepting signatures on petitions on grounds that the initiative was unconstitutional. Judge Irving H. Perluss denied the request, saying: *"It is fundamental that in our democratic society the*

rights the people have reserved to themselves must always be jealously guarded."

The California Democratic Council, in another action, requested a superior court in San Bernardino to stop county clerks there from accepting petitions, again on alleged constitutional grounds. Judge Joseph T. Cieno ruled against the C.D.C., saying, "This is a matter which should be passed on by the courts, if and when the initiative is passed by voters."

The question of the constitutionality of the initiative was recently put to the Legislative Counsel of the State of California. The reply, dated February 2, 1964, stated: *"We believe that the measure would probably be held to be constitutional."*

The Legislative Counsel's opinion also pointed out that the amendment does not discriminate against citizens for reasons of race, color, religion, national origin or ancestry, and added: *"It is our opinion, therefore, that the initiative measure, if adopted, would be held not to violate the Equal Protection clause of the Fourteenth Amendment of the Federal Constitution."*

4. Opponents of the initiative often argue that it will cause racial bitterness. The *Los Angeles Times,* in an editorial February 2, 1964, supporting the initiative, spoke of the Rumford Act itself as a more likely cause of bitterness. It wrote: *"Artificial laws designed to hasten the process of social, as distinct from civil, justice can only exacerbate the situation—and, in the opinion of The Times, defeat their very purpose. Discrimination will disappear only when human prejudice succumbs to human decency.*

"The philosophical fallacy of the Rumford Act, unhappily, lies in seeking to correct such a social evil while simultaneously destroying what we deem a basic right in a free society."

The initiative, by removing such force and restoring a basic right equally to all citizens, should relieve tensions between ethnic groups, leaving human decency and good will as powerful allies in overcoming prejudice.

FREEDOM OF CHOICE vs. FORCED HOUSING

A discussion of the grounds for the California Real Estate Association's support of an initiative constitutional amendment to restore in California the property owner's right to sell or rent his property to whomever he chooses.

THE CALIFORNIA REAL ESTATE ASSOCIATION
117 West Ninth Street
Los Angeles, California 90015

BACKGROUND

On September 20, 1963, Assembly Bill 1240, often called the Rumford Act after one of its principal authors, became law in California. The Act states that *"The practice of discrimination because of race, color, religion, national origin or ancestry in housing accommodations is declared to be against public policy."*

It declares further: *"This part shall be deemed an exercise of the police power of the State for the protection of the welfare, health, and peace of the people of this State."*

The Act then specifies housing coming under its jurisdiction as:

1. All publicly assisted housing which are multiple dwellings.
2. All publicly assisted single family dwellings which are owner occupied.
3. All multiple dwellings of five or more units, however financed.

The term "publicly assisted" refers to housing federally insured through the Federal Housing Authority or Veterans' Administration, Calvet loans, housing which is tax exempt for any reason except the owner's veteran status, or housing constructed on land acquired by the State or sold by the State below cost.

Exempt from "multiple dwellings" covered are hospitals, convents, monasteries, and public institutions.

The Unruh Civil Rights Act (Section 51 of the Civil Code), which went into effect in 1959, provides: *"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."*

While the Unruh Act applies to business establishments, decisions by the courts in California have construed it to cover the "business" of apartment renting. In the case of *Swan v. Burkett* (209 C.A. 2d, 685; Nov. 1962) an owner of a three-

unit apartment building was ruled under jurisdiction of the Act since he was renting a dwelling for gain.

ENFORCEMENT

Under the Unruh Act, the complainant may enter suit through the courts.

Under the Rumford Act, enforcement is vested in the Fair Employment Practices Commission. If the complainant elects FEPC enforcement, he waives procedures available through the courts under the Unruh Act.

If the FEPC finds discrimination and attempts at conciliation fail, it is empowered to take one of these actions:

1. Order the sale or rental to the complainant if the housing accommodation is still available.
2. Order the sale or rental of a like accommodation, if one is available, or the next vacancy in a like accommodation.
3. Order the payment of damages not to exceed $500 if neither remedy (1) or (2) is available.

If the accused violates the commission's order, the commission may ask a superior court to enforce the order, with the violator subject to contempt of court. Under contempt of court proceedings, the violator can be jailed.

All commission orders are appealable to the courts.

VIOLATES RIGHTS

Our nation was founded as a free society granting equality under law to all of its citizens. As part of this philosophy of government, individual citizens have traditionally been allowed entire latitude in acquiring and using property to their own benefit, so long as that property use does not constitute a threat to the health or safety of other citizens.

The Rumford Act, and the Unruh Act as it applies to housing, violate this guarantee of equal treatment under law as defined in the Fourteenth Amendment to the Constitution, part of which provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Rumford Act, by granting one group of citizens' rights for reason of race, color, religion, national origin or ancestry, necessarily takes equivalent rights away from the rest of the citizenry. This is denying equal protection under the laws.

Since the Act is intended to forbid discrimination against minority groups, the effect is to force a property owner to sell or rent to a person of a minority group, provided he is otherwise qualified, whether the owner wants to or not.

ABRIDGES PRIVILEGES

This abridges the privileges of property ownership. Under our system of free enterprise the individual has control over the use and sale of his property until he freely transfers it to another. To deny him that right and substitute for his free consent an order by the state, backed by its police power, amounts to confiscation by the state. The state is saying, in effect, that the owner may keep his freedom of choice so long as his choice agrees with that of the state. If the state does not agree, it will take away the property owner's freedom by dictating what that choice must be.

Such control of private property by the State is what distinguishes the Communist form of government from our own system. The Communist approach assumes that public welfare always takes precedence over individual desires. Once that assumption has been made it follows that the State must designate itself to decide what constitutes public welfare.

The State of California has reversed the procedure by first declaring that discrimination is against public policy. Having established that premise, the rights of the individual property owner or his desires no longer take precedence.

Zoning regulations apply to the property itself rather than the owner and apply equally to any-

one who owns or rents it and therefore, do not abridge the owner's constitutional rights.

CLAIM "HUMAN RIGHTS"

What is the reason for this denial of equal rights to all citizens? Supporters of the Rumford Act justify it as a means of giving a minority group member the "human right" to buy or rent housing wherever he chooses, provided he has the money and is otherwise a desirable citizen.

Morally, this is an admirable goal. But the moment this desire by the individual for what is not his is granted by law, over the wishes of the owner, it ceases to be admirable. As a resolution adopted by the American Council of Christian Churches states:

"The right of private property is a human right required by the Commandment, 'Thou shalt not steal,' and is absolutely fundamental to all other rights guaranteed in the Bill of Rights. To pit so-called 'human rights' against property rights as if the former override the latter is a specious and misleading argument. If property rights go, all rights go."

All contractual relations under American law, to be valid, have always rested on mutual consent between the parties. The law provides that a contract may be declared invalid if it is proved that one party used force to accomplish it. It is a shocking repudiation of this principle when a state legislature writes into law that force in some contracts is legal.

This is why the term "fair housing" applied to such contracts is a flagrant misnomer. It is not fair housing; it is forced housing.

FOUGHT LEGISLATION

The California Real Estate Association fought against legislation similar to the Rumford Act in the 1961 Legislature; that bill, AB 801, was defeated. It fought AB 1240 in the 1963 legislative session; that bill was passed and became law.

Immediately, some citizens who objected to the law, began a referendum to repeal the Act. While the California Real Estate Association was in sympathy with their aim, it did not join in the effort to gather the necessary voter signatures on

PROPERTY OWNERS' BILL OF RIGHTS

In 1789, the people of America were fearful that Government might restrict their freedom. The first Congress of the United States, in that year, proposed a Bill of Rights:

The Bill of Rights, essentially, tells the Government what it cannot do. The statements comprise the first ten amendments to the United States Constitution.

The Bill of Rights has had a profound impact upon the history of the World.

Forty million Immigrants gave up much to come to this land, seeking something promised here—and only here. Many countries have abundant natural resources, vast vacant lands and climate as good as America.

They came here for the promise of security—the promise of freedom—for the precious right to live as free men with equal opportunity for all.

In July of 1868, a new guarantee of freedom was ratified. Its purpose was to guard against human slavery. Its guarantees were for the equal protection of all.

This new guarantee of freedom is the 14th Amendement. It reads, in part, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

The vital importance of these federal laws was reemphasized in a recent statement of the Chief Justice of the United States in which he urged the retention of "Government of laws in preference to a Government of men."

Today, the rights and freedoms of the individual American property owner are being eroded. This endangers the rights and freedoms of all Americans. Therefore, a Bill of Rights to protect the American property owner is needed.

It is self-evident that the erosion of these freedoms will destroy the free enterprising individual American.

It is our solemn belief that the individual American property owner, regardless of race, color or creed, must be allowed, under law, to retain:

1. The right of privacy.

2. The right to choose his own friends.

3. The right to own and enjoy property according to his own dictates.

4. The right to occupy and dispose of property without governmental interference in accordance with the dictates of his conscience.

5. The right of all equally to enjoy property without interference by laws giving special privilege to any group or groups.

6. The right to maintain what, in his opinion, are congenial surroundings for tenants.

7. The right to contract with a real estate broker or other representative of his choice and to authorize him to act for him according to his instructions.

8. The right to determine the acceptability and desirability of any prospective buyer or tenant of his property.

9. The right of every American to choose who, in his opinion, are congenial tenants in any property he owns — to maintain the stability and security of his income.

10. The right to enjoy the freedom to accept, reject, negotiate or not negotiate with, others.

Loss of these rights diminishes personal Freedom and creates a springboard for further erosion of Liberty.

National Association of Real Estate Boards
36 South Wabash Ave., Chicago 3, Illinois
Approved, June 4, 1963

Published as a Public Service

California Real Estate Association
117 West 9th Street, Los Angeles 15, California
Original Copy Approved, March 16, 1963

HELP!

RESTORE YOUR RIGHT TO SELL OR RENT YOUR HOME TO ANY PERSON YOU CHOOSE!

☒ VOTE "YES"

ON PROPOSITION 14

Committee For- **YES** on **PROPOSITION 14**
To Abolish The **RUMFORD FORCED HOUSING ACT**
609 So. Grand Avenue, Los Angeles, Calif. 90017

YES 14

ABOLISH RUMFORD ACT

RESTORE PROPERTY RIGHTS

The *Truth* about the Rumford Act

Trial, WITHOUT JURY, before a board of political appointees selected by the governor (para. 35730 and Sec. 1414 Labor Code).

You are ASSUMED GUILTY until you prove yourself innocent, at your own expense (para. 35734).

You have NO APPEAL to a constituted court of law which would allow you trial by jury (para. 35738).

If you do not prove your innocence to the satisfaction of the governor's appointees you may be "FINED" up to $500 (para. 35738).

Your money is then given to the informer as a "REWARD" (para. 35738).

You have NO PROTECTION from professional informers — persons who just shop around, hoping to be turned down so they can collect $500.

If you refuse to pay you can be IMPRISONED on contempt of court charges.

Read The Rumford Act For Yourself

AND SEE WHY

Not ONE of Orange County's FOUR Legislators Voted For It

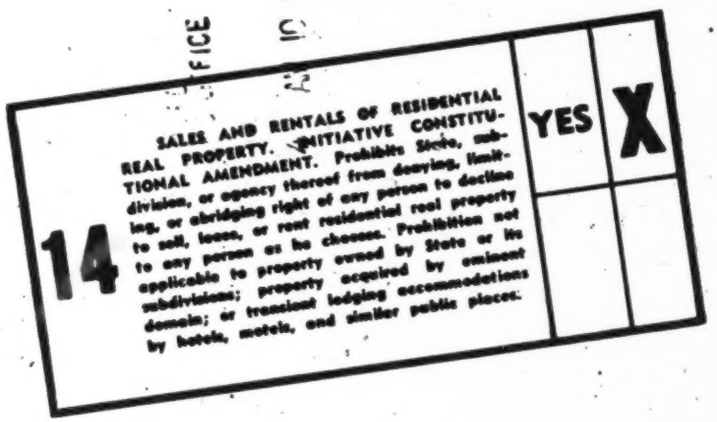
★ ★ ★

THE ORANGE COUNTY CHAPTER OF THE CITIZENS COMMITTEE FOR A YES ON #14

Headquartered at: 322 West 17th Street, Santa Ana, Calif.

BELIEVES . . .

That EVERY citizen regardless of his Race, Color or Religion should have the CIVIL RIGHT to manage or dispose of his Real Property Without Governmental Intervention.



The *Facts* about Proposition #14

YES VOTE — **Will RESTORE to California property owners the right to choose the person or persons to whom they wish to sell or rent their residential property.**

YES VOTE — **Will ABOLISH these provisions of the Rumford Forced Housing Act of 1963 which took from Californians their freedom of choice in selling or renting their residential property.**

YES VOTE — **Will AMEND our California Constitution so that the only way future legislation could take away the freedom of choice in selling or renting of residential property would be by vote of the people.**

YES VOTE — **Will HALT the State Fair Employment Practices Commission's harassing and intimidating the public and property owners in the excercising of their freedom of choice.**

YES VOTE — **Will END State police power over the selling or renting of privately owned residential property.**

YES VOTE — **Will RESTORE rights basic to our freedom that permit all persons to decide for themselves what to do with their own property.**

RESTORE AND PROTECT
For ALL Californians
"FREEDOM OF CHOICE"

VOTE **YES** **X** on Proposition 14

An UNINFORMED or MISLED Vote could cost you your FREEDOM

MAR 3 1967

SUPREME COURT, U. S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, et al.,
Petitioners,

vs.

LINCOLN W. MULKEY, et al.,
Respondents.

CLARENCE SNYDER,
Petitioner,

vs.

WILFRED J. PRENDERGAST, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF, AMICUS CURIAE
and
BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMICUS CURIAE

MARSHALL W. KRAUSE,
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San Francisco, California 94105,
Attorney for Amicus Curiae.

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Respondents.

On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Civil Liberties Union of Northern California respectfully moves for leave to file a brief as *amicus curiae* in this case. The consent of the attor-

neys for respondents has been obtained. The consent of the attorneys for petitioners was requested but refused.

Amicus is a non-profit organization which has participated in significant civil liberties causes for the thirty-three years of its existence. Counsel for *amicus* was counsel in the Supreme Court of California in two cases[1] also raising the issue of the validity of Proposition 14. Neither of the losing parties in those cases chose to carry them further. One of the two cases is still pending, the other having been settled before trial. *Amicus* believes that the constitutionality of Proposition 14 which is at issue in this litigation, poses a highly significant constitutional question as to which the Court should have a number of varied legal arguments.

An examination of the briefs filed in the Court below suggests that the arguments which we offer will not be presented by the respondents in these cases.

Dated, San Francisco, California,
March 1, 1967.

Respectfully submitted,

MARSHALL W. KRAUSE,
Staff Counsel, American Civil Liberties Union
of Northern California,
Attorney for Amicus Curiae.

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[1] *Thomas v. Goulis*, 64 Cal.2d 884, and *Grogan v. Meyer*, 64 Cal.2d 875.

In the Supreme Court
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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AS AMICUS CURIAE

OPINION BELOW

The opinion of the California Supreme Court in *Mulkey v. Reitman* is reported at 64 C.2d 529, 50 Cal. Rptr. 881, 413 P.2d 825, and *Prendergast v. Snyder* is reported at 64 C.2d 877, 50 Cal. Rptr. 903, 413 P. 2d 847.

SUMMARY OF ARGUMENT

The effect of Proposition 14 (which, if lawful, would add Section 26 to Article I of the Constitution of California) is to create a constitutional right to discriminate on the basis of race in the sale or rental of housing in California.

The establishment of such a right has the effect of encouraging race discrimination in the housing market. Unlike the mere repeal of unwanted legislation, it provides great assurance that in the future the practice of race discrimination will not be disturbed, either by legislative, executive, or judicial action on a statewide basis, or by governmental action on a municipal basis. Moreover, the establishment of a *constitutional right* of any kind inevitably carries the connotation that the State does not find the exercise of that right morally objectionable. This alters the moral climate in California with regard to race discrimination in housing, thus further encouraging the practice of such discrimination.

ARGUMENT

INTRODUCTION

The purpose of this brief is to suggest arguments in support of the judgment of the California Supreme Court. In our view the importance of the issues which this case presents makes it fruitless to seize upon, as petitioners have done, isolated language in the opinions of the Court below. While this tends toward depicting the judgments which peti-

tioners attack as radical departures from accepted doctrine, it also obscures analysis. As a result, the central theme of the California Supreme Court's opinion—that Proposition 14 encourages and assists acts of race discrimination—is virtually ignored and nearly all of petitioners' brief is devoted to other, irrelevant, matters. We propose to bring, in the pages that follow, the real issues in these cases into clearer focus.

Because petitioners' brief contains so many criticisms of theories advanced—or, rather, which petitioners assert have been advanced—in support of the judgment here under review, we believe it will be helpful to state what it is *not* necessary to contend to support the judgment below:

(1) We do not here urge obliteration of the distinction between state and private action. The Court reiterated last term that the Equal Protection Clause reaches only "state action" in *United States v. Guest*, 383 U.S. 745 (1966); this case presents no occasion whatever to question that principle.

(2) Nor do we urge that a state, having enacted "fair housing" legislation, is forever barred from repealing it. The California Supreme Court's opinion perhaps lends itself to interpretation as having adopted such a principle. We may agree with the petitioner that adoption of such a principle would constitute a radical extension of constitutional doctrine. But the considerable discussion devoted in petitioners' brief to this aspect of the case is an attack on a straw-man. The vice of Proposition 14 is that it

goes far beyond mere repeal of the existing fair housing legislation in California and enshrines the affirmative right to discriminate in the State's Constitution.

(3) We do not here contend that the State has an affirmative duty to prevent acts of private race discrimination in the housing market. Indeed, despite an assertion to the contrary in the petitioners' brief,[2] the California Supreme Court advanced no such notion, expressly stating its view that the "Fourteenth Amendment does not impose upon the State the duty to take positive action to prohibit a private [act of] discrimination." *Hill v. Miller*, 64 C.2d 757, 759, 51 Cal. Rptr. 689, 415 P.2d 33 (1966), decided together with the instant cases. This case does not, therefore, require consideration of whether the absence of *any* legislation in the area of housing presents problems of constitutional stature. Indeed, we assume that it does not.

(4) We do not argue that *Shelley v. Kraemer*, 334 U.S. 1 (1948), disposes of this case. This Court is doubtless aware of the scholarly discussion which *Shelley* has generated; although these questions are of considerable interest, they need not be resolved here. We do not understand the decision of the California Supreme Court to rest on *Shelley*.[3] In any

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[2] "By invalidating Section 26 the Court below has held that the failure of California to provide a remedy which it once provided . . . violates the equal protection clause." Brief for Petitioners, p. 28.

[3] Although the Court below in *Prendergast v. Snyder* seemingly approved the *Shelley* rationale adopted by the trial Court, its opinion elsewhere states, in reference to *Abstract Investment Co. v. Hutchison*, 204 Cal.App.2d 242, 22 Cal. Rptr, 309 (1962)

event, the judgment in these cases can be sustained without relying on *Shelley* in any way. There is, therefore, no occasion to consider whether the principle announced in *Shelley* applies to situations other than that where there is judicial enforcement of racial restrictions contrary to the wishes of a seller and buyer.

I. PROPOSITION 14 CREATES A CONSTITUTIONAL "RIGHT" TO DISCRIMINATE IN THE SALE OR RENTAL OF HOUSING AND THEREBY LENDS THE APPROVAL AND SANCTION OF THE STATE TO ACTS OF RACIAL DISCRIMINATION IN THE HOUSING MARKET.

A. Proposition 14 Creates a Constitutional "Right" to Discriminate in the Sale or Rental of Housing.

The addition of Article I, Section 26 to the Constitution of California would work radical changes in the fabric of California's legal and social structure as respects racial discrimination in the field of housing.[4] The *effect* of the Amendment[5] would be to

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(holding that *Shelley* bars judicial enforcement of a landlord's desire to evict a tenant for racial reasons): "[W]e are not required to rely upon that case in affirming the judgment herein." 64 C.2d at 879.

Moreover, the Court below refused to extend the *Abstract* case's broad reading of *Shelley* in a companion to the instant cases, *Hill v. Miller*, 64 C.2d 757, 51 Cal. Rptr. 689, 415 P.2d 33 (1966). In *Hill*, no state legislation was applicable. Plaintiff sued to restrain his landlord from evicting him on the sole ground of his race. Although it was alleged that the landlord intended to seek *judicial* relief through an unlawful detainer action, the Court below denied relief rejecting plaintiff's *Shelley-Abstract* argument.

[4]Prior to the passage of Proposition 14, opponents of fair housing legislation had been unsuccessful in stemming the tide. The Unruh Act (Calif. Civ. Code §§ 51-52), which bars discrimination by "business establishments", was enacted in 1959. It was thereafter held to apply to real estate brokers, *Lee v. O'Hara*, 57 C.2d 476, 20 Cal. Rptr. 617, 370 P.2d 321 (1962), to apartment

establish a *constitutional right* to discriminate on racial[6] grounds in the sale or rental of California residential property. This right is based on far more than the mere absence of any legislation forbidding such discrimination. Rather, the "right" of which we speak is derived from several distinctive features of Proposition 14:

(1) Without a further amendment of the California Constitution, the Legislature is disabled from enacting "fair housing" legislation of any kind or description. Presumably, since the entire field is withdrawn from the legislative domain, the Legislature is even barred from investigating the need for such legislation.

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buildings of 3 units or more, *Swann & Burkett*, 209 Cal.App.2d 685, 26 Cal. Rptr. 286 (1962), and to commercial real estate developers, *Don Wilson Builders v. Superior Court*, 220 Cal.App.2d 77, 33 Cal. Rptr. 621 (1963). In addition, the Hawkins Act (Cal. Stat. 1959, ch. 1681, at 4074, formerly Calif. Health & Safety Code § 35700 et seq.), which the Rumford Act superseded, barred discrimination in certain "publicly assisted" multiple housing. The Rumford Act (Calif. Health & Safety Code § 35700 et seq.) consolidated the coverage of Unruh and Hawkins, generally speaking, and added a procedure for administrative enforcement modeled after California's earlier Fair Employment Practices Act (Calif. Labor Code § 1410 et seq.).

[5]For the present, we need not inquire as to the "purpose" of Proposition 14. Our immediate concern is with its effect. Petitioners, who raise Article I, Section 26 as a defense to charges that they violated California's anti-discrimination laws, appear to be in agreement with our view as to the Amendment's effect.

[6]The language of the Amendment is not, of course, confined to race; it purports to protect the "right" of the property owner to "decline to sell, lease or rent . . . to such person or persons as he, in his absolute discretion, chooses." Petitioners do not dispute that, as a matter of California law, Proposition 14 at the least operates in the field of race discrimination to nullify existing "fair housing" legislation and to forbid similar future legislation. See 64 C.2d at 533-535, where the California Supreme Court so found.

(2) Municipal and other local governments are similarly disabled.[7]

(3) The executive branch of California's government is precluded from taking any action in this field such as President Kennedy took in barring discrimination in federally assisted housing (Executive Order, No. 11063, 27 Fed. Reg. 11527 (1962)).

(4) California's judiciary is likewise barred from developing common-law principles forbidding race discrimination in housing as it did with regard to discrimination by labor unions, see *James v. Marinship Corp.*, 25 C.2d 721, 155 P.2d 329 (1944); *Williams v. Boilermakers*, 27 C.2d 586, 165 P.2d 903 (1946), and *de facto* segregation in the public schools, see *Jackson v. Pasadena City School District*, 59 C.2d 876, 881-882, 31 Cal. Rptr. 606, 382 P.2d 878 (1963) (state policy requires school boards to take steps to alleviate sub-

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[7]Article I, Section 26, prohibits the State of California and "any subdivision . . . thereof" from adopting legislation forbidding discrimination in the sale or rental of housing. Thus the State of California—through its Constitution—provides assistance to those who would practice discrimination wherever a local governmental body would otherwise have enacted fair housing legislation and have been supported by a large majority of the voters. Many communities in California may well wish to adopt fair housing legislation notwithstanding the opposition to such legislation in other parts of the State. By adopting Article I, Section 26, the State facilitates race discrimination by owners of residential property within such communities. It is, in other words, one thing for the State to choose not to adopt fair housing legislation on a statewide basis; it is quite another to prevent each local government from passing such legislation. Although we can find no cases squarely on point, this in itself seems to be "state action" on the side of race discrimination.

stantial racial imbalance even where no *de jure* segregation is shown).[8]

Not long ago, the California Supreme Court was able to declare with respect to discrimination in housing:

> "Discrimination on the basis of race or color is contrary to the public policy of the United States *and of this State.*" (*Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471 (1962) (Emphasis added.)

As respects California's policy toward housing, that statement simply would no longer be true if Proposition 14 becomes law. It would create a new policy permitting property owners to discriminate against their fellows on racial grounds, and disabling government at all levels within the State from dealing with such discrimination.

B. The State May Not Enshrine the "Right" to Discriminate in Its Constitution Where This Serves to Encourage Citizens to Exercise That "Right".

With the effect of Proposition 14 in mind, we are brought to the ultimate question of whether, if the constitutional "right" of property owners to engage in racial discrimination is created, California will

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[8]For example, without the restraint of Article I, Section 26 it might be determined that, whatever the reach of *Shelley v. Kraemer*, the Courts of California will not lend judicial assistance to a property owner seeking to dispossess a tenant on the ground of race. *Cf. Abstract Investment Co. v. Hutchison, supra*, note 2, where the Court, while reading *Shelley* as barring an unlawful detainer action motivated by racial prejudice, also viewed the landlord's motives as a proper basis for denying him relief as a matter of equity. See 204 Cal.App.2d at 247-249, 250-251.

have departed from that position of neutrality the Equal Protection Clause commands it to maintain. We believe that the Amendment has this effect. Creation of a constitutional "right to discriminate" in the field of housing will inevitably encourage and promote exercise of that "right."

1. The Amendment Guarantees That the Practice of Race Discrimination in Housing Will Not Be Abolished by Governmental Action, and the Development and Use of Property Will Proceed in Reliance Upon This Promise.

Proposition 14 assures the citizens of California that race discrimination may be practiced freely not only today but in the years to come. While no one can state with certainty that the California Constitution will *never* be amended, the economic and political difficulties in securing such an amendment render that action unlikely. Thus, so long as Article I, Section 26 remains the law of California, the State government and local governments will be powerless to deal with the serious problem of discrimination in housing. Citizens will order their conduct in reliance upon this state of affairs. Patterns of housing will develop with the expectation that the practice of discrimination may continue unrestricted in the foreseeable future. For example, citizens wishing to reside in an "all-white" community may forego the conveniences of an urban address and purchase a home in a segregated suburb in the expectation that, without the pressure of fair housing legislation, the segregated character will be preserved. The expectations which will develop in such a community will

serve to create a formidable barrier to any member of a minority group seeking to acquire property in that community. Conversely, the barriers surrounding racial ghettos in the cities of California will be intensified. Private capital—necessary to upgrade the quality of housing and achieve integration—will not be attracted to the ghettos. In short, the complex fabric of commercial and residential life within California will be affected by the creation of an environment in which patterns of discrimination in housing may develop and flourish.

2. By Enshrining the "Right to Discriminate" in California's Constitution, the State Encourages the Exercise of That Right by Altering of the Moral Climate as Respects Discrimination.

Discrimination is encouraged in another, equally significant way. Article I, Section 26 puts the State in the position of condoning race discrimination; it repudiates, in the field of housing at least,[9] California's historic policy opposing race discrimination in the private as well as public sector, including the housing market. *Burks v. Poppy Construction Co.*,

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[9]The accuracy of our description of Proposition 14 as establishing an affirmative State policy sympathetic to race discrimination in housing is in no way diminished by the existence of various statutes forbidding discrimination in other contexts, summarized by Petitioners in an appendix to their brief. (App., pp. 12-14). Except for a few statutes which either restate what the Constitution plainly requires, such as those forbidding the state to discriminate with regard to publicly held property, these statutes do not pertain to the area of real estate and housing. While there is undoubtedly some moral inconsistency in accepting Negroes in a commercial setting (e.g., in employment, see Calif. Labor Code §§ 1410-32) but not in certain residential neighborhoods, that is precisely the posture in which the State finds itself.

supra. In its place the Amendment substitutes a constitutional right to discriminate.

Proposition 14 purports to add a new section to Article I of the Constitution of the State of California. Article I carries the general caption "Declaration of Rights". Safeguarded against legislative interference by Article I are the rights of religious liberty and conscience (Article I, Section 4); the privilege of the Writ of Habeas Corpus (Section 5); the right to bail and the prohibition against cruel and unusual punishment (Section 6); the right to trial by jury (Section 7); the right to counsel (Section 8); freedom of speech and press (Section 9); the right of assembly and to petition for redress of grievances (Section 10); the right to a speedy and public trial (Section 13); the prohibition against double jeopardy (*id.*); the prohibitions against bills of attainder and ex post facto laws (Section 16); and the prohibition against unreasonable searches and seizures (Section 19). Proposition 14 adds a new "right"—the "right" to practice race discrimination.

We submit that the State may not add the right to discriminate to its Bill of Rights and then claim "neutrality" on the subject. Constitutional rights are respected and revered in this country as proof of its highest principles. Article I, Section 26 establishes an *affirmative public policy* in California facilitating discrimination in housing; it would equate the "right to discriminate" with the great rights already enshrined in California's Declaration of Rights. Housing discrimination, no matter how harmful to the

community at large and to the minorities within it, cannot be reproached by legislative, executive, or judicial action. This striking declaration of public policy will inevitably encourage many Californians to exercise their new-found "right". Race discrimination no longer need be practiced in shame in California; it now bears the imprimatur of State approval.

The effect of this elevation of race discrimination to a constitutional right is not diminished by the absence of any reference to race in the Amendment. For there is no question that—as the California Supreme Court found as a fact—Proposition 14 was passed for the principal (if not the sole) purpose of protecting the property owner's privilege of discriminating on grounds of race. Whatever other ends may be attributed to Proposition 14 (and we can think of none which are not fictitious), its core purpose had to do with race discrimination, and it was and is so understood by the public.[10]

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[10]The California Supreme Court found as a fact that Proposition 14 was enacted for the purpose of protecting the privilege of the property owner to discriminate on the basis of race, religion and national origin in the sale or rental of his property:

> "A state enactment cannot be construed without concern for its immediate objective [citations], and for its ultimate effect [citations]. To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. . . ."
>
> [The court then reviewed the historical development of legislation in California respecting race discrimination.]
>
> "Proposition 14 was enacted against the foregoing historical background with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might

The elevation of the "right" to discriminate to constitutional status is particularly significant in California where respect for the exercise of constitutionally protected rights is cultivated by the State. The State Board of Education, reflecting Mr. Justice

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circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market." (64 C.2d, at 533-535).

The California Supreme Court elsewhere stated, in a similar vein:

"[W]e can conceive of no other purpose for an application of Section 26 aside from authorizing the perpetration of a purported private discrimination where such authorization or right to discriminate does not otherwise exist." *(Mulkey v. Reitman,* 64 C.2d, at 544.)

The purpose of Proposition 14—to facilitate race discrimination—was expressly urged upon the voters of California. Indeed, the official ballot argument's guarded language makes clear the purpose to restore the privilege of race discrimination in the disposition or management of real property:

"Your 'Yes' vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish without interference by State or local government.

"Most owners of property in California lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.

. . . . . .

"Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions." (Quoted in Appendix to Brief for Petitioners, pp. 3-4, emphasis added).

This Court cannot be hampered by clever draftsmanship in exercising its role as final arbiter of constitutional disputes. Time and again this Court has found in seemingly neutral legislation a concealed discriminatory condition or purpose. See, e.g., *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Lane v. Wilson,* 307 U.S. 268 (1939); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960).

We suggest that the popular understanding of Proposition 14's purpose and effect was and is precisely what the Court below found it to be. "Its . . . effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?" *Child Labor Tax Case,* 259 U.S. 20, 37 (1922).

Brennan's concern with "the need to place greater emphasis upon individual rights and liberties in the American social studies curriculum" (Brennan, "Breathe Life Into Constitutional Guarantees of Liberty," *Journal of the California Teachers Association,* January, 1965, p. 4) has resolved that:

> "No student should leave our schools without a lively knowledge of the American Constitution, for here are found the main principles of our heritage. Our democracy can be kept strong only by the dedication of every new generation to the discipline of liberty. In knowledge of the Bill of Rights and in loyalty to its propositions rests our faith in the future.
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> * * * * *
>
> "We believe that teaching in this field no matter how controversial the issue, should be conducted within the framework of free discussion. Not only the history of the Bill of Rights should be taught, but contemporary issues it raises, such as the debate over separation of church and state embodied in the First Amendment, and the privilege against self-incrimination as provided in the Fifth Amendment, should be discussed. Now is the time to help our young people to become aware of the risks, the privileges and the personal demands of freedom." (Resolution of the California Board of Education, October 10, 1963).

The legislature requires that this program of instruction not be confined to the United States Constitution, but that it include the study of the State Constitution as well. (Calif. Education Code § 7901).

Calling on the resources of private groups and educators, California's educational system is a leader in the national movement to inculcate younger citizens in the fundamental principles of constitutionalism.[11] If Proposition 14 became a section of the California Constitution, the "right to discriminate" will become a required subject of instruction in California; students throughout the State will come to view race discrimination as an essential component of a free society.

A striking parallel to the instant case is found in *Anderson v. Martin*, 375 U.S. 399 (1964). There a Louisiana law required designation of the race of all candidates for public office on the ballot. Although the law did not *compel* discrimination, this Court struck it down, declaring that it was *likely* to encourage the voters to cast their ballots on racial grounds. The Court, drawing on its own understanding and experience, did not require statistical data to conclude that the designation of the candidates' race on the ballot would foster discrimination in the voting booth. The kind of encouragement found in *Anderson* is similarly present here. And the disfavor in which the constitution holds racial discrimination, see

[11]See, e.g., McKenney, *Teaching the Bill of Rights in California*, *Saturday Review*, March 19, 1966:

> "California's experiment, however, has moved further than most toward effective teaching in this area. It is unique because it is not being developed in one school district or one university or college, but is the result of the cooperative effort of members of the State Board of Education, university and college educators, classroom teachers, lawyers, and community leaders . . . . [I]f the movement spreads, it will be good for the whole country."

Harper v. Virginia, 383 U.S. 663, 667 (1966), again commands judicial sensitivity to constitutional encouragement of discrimination.

Anderson also provides an opportunity to correct petitioners' misconception about the determination of the Court below that Proposition 14 unconstitutionally authorizes and encourages race discrimination. Petitioners correctly point out that there has been no finding that Proposition 14 *caused* the discriminatory conduct in the case at bar.[12] This, of course, is related to the point raised by Mr. Justice Harlan in *Peterson v. Greenville*, 373 U.S. 244, 252-253 (1963) (separate opinion) and in his dissenting opinion in *Evans v. Newton*, 382 U.S. 296, 316, n. 1 (1966). But this case differs in a critical respect from those cases.

In *Peterson v. Greenville*, the Court reversed the trespass conviction of 10 negroes who had refused to leave a segregated lunch counter after having been denied service on the ground of their race. The basis of reversal was the existence of a local ordinance requiring segregated service in such establishments. Mr. Justice Harlan's difficulty with the Court's opinion lay in the majority's failure to demonstrate a *causal relationship* between the ordinance and the discriminatory conduct of the restaurant owner.

Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), Mr. Justice Harlan rejected Mr. Justice White's approach because there was no showing of

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[12]Such a finding could not have been made in *Mulkey* as the discrimination there occurred prior to the passage of Proposition 14.

causation. There a Georgia statute was seen by Mr. Justice White as facilitating establishing discriminatory provisions in the dedication of a park in trust for the public. The issue was whether a park, so dedicated, could be operated on a segregated basis. Mr. Justice Harlan, though not contending that the state statute was valid, was unable to conclude that its existence infected the dedication of the trust by causing the insertion of the discriminatory provisions.

But these difficulties are simply not present in the instant case. The challenge here is directed toward the *existence* of a state law which authorizes and encourages race discrimination.[13] We do not suggest that, in this respect, the discrimination of petitioners is itself "state action" any more than this Court held in *Anderson* that racially motivated voting is "state action." Indeed, Justice Clark's opinion very carefully disclaims any such holding:

> "At the outset it is well we point out what this case does not involve. It has nothing whatever to do with the right of the citizen to cast his vote for whomever he chooses and for whatever reason he pleases. . . . It has only to do with the right of the State to require or *encourage* its

[13]Respondents, who seek relief under a California statute forbidding discrimination (Unruh Act, Calif. Civ. Code §§ 51-52), therefore have standing to attack the constitutionality of Proposition 14 without providing that it "caused" the discrimination of which they complain. The unconstitutionality of Proposition 14 arises because it will inevitably encourage some owners of property to discriminate. A judgment holding Article I, Section 26 unconstitutional restores the Unruh Act which prohibits discrimination by the owner of commercial real estate regardless of any state participation in the transaction.

voters to discriminate on the grounds of race." (375 U.S. at 402.)

We do not, therefore, focus on private conduct. We do not contend that Proposition 14 "caused" the property owners who are petitioners here to discriminate against respondents. We contend only that Proposition 14 must cause acts of racial discrimination in California which would not take place had the state merely repealed all fair housing legislation. To strike it down would, so far as the Constitution is concerned, permit private property owners to discriminate, but would restore the state to a neutral position by ending state encouragement of such discrimination.

The constitutional principle which we urge follows from the often expressed view that a state may not, by statute, authorize acts of race discrimination. Years ago this Court held that a state may not enact a statute which authorizes private acts of discrimination. *McCabe v. A.T.&S.F. Ry. Co.*, 235 U.S. 151 (1914). In that case this Court concluded that the denial of equal railroad facilities to Negroes by a railroad was unconstitutional state action where authorized by a state statute.

This principle was reiterated by several Justices in *Burton v. Wilmington Park Authority*, 365 U.S. 715 (1961). Mr. Justice Stewart, concurring, read the opinion of the lower Court to have construed state law as:

"authorizing discriminatory classification based exclusively on color. Such a law seems to me

> clearly violative of the Fourteenth Amendment." (*Id.*, at 727).

While unable to read the statute in the same manner, Mr. Justice Frankfurter, dissenting, stated:

> "If my brother [Stewart] is correct in so reading the decision of the Delaware Supreme Court, his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is undoubtedly a denial by a State of the equal protection of the laws. . . ." (*Id.*, at 727.)

Mr. Justice Harlan, joined in dissent by Mr. Justice Whittaker, also expressed the same view. See *Id.*, at 728.

Mr. Justice White's concurring opinion in *Evans v. Newton*, 382 U.S. 296, 302 (1966) follows similar lines. There Justice White reviewed the legal background against which Senator Bacon drew his will containing provisions for the establishment, in trust, of a racially segregated park. State legislation, adopted six years before execution of the Senator's will, expressly authorized the dedication of parks to be operated on a segregated basis. Because the statute was permissive only, Justice White concluded that "the State cannot be said to have coerced private discrimination" *Id.*, at 306. But, Justice White added, the statute clarified certain legal doubts smoothing the way for the dedication in trust of a segregated park, and thereby implicated the state in the discrim-

ination reflected in the trust created pursuant to this statute.[14]

Concededly, Justice White's opinion placed some emphasis on an aspect of the Georgia law for which there is no parallel here. Georgia had removed certain legal obstacles to creating *racial* limitations in the dedication of public parks while leaving unaffected the barriers to creating other kinds of limitations. Thus, it might be argued that Georgia singled out race discrimination for special treatment.

Any distinction between *Evans* and the instant cases in this respect is, we submit, superficial. Despite its neutral language, Proposition 14 is in fact directed toward *racial* discrimination and no other.[15] The vice of the Georgia statute with which Justice White dealt in *Evans* was that it tended to encourage race discrimination by those dedicating parks to the public. The singling out of *racial* restrictions by the Georgia legislature made certain the State's approval

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[14]The opinion of the Court expressly states that the majority did not reach the questions posed by Mr. Justice White. 382 U.S. at 300, n. 3.

Mr. Justice Black dissented on the ground that the issue of the trust's validity was not before the Court. 382 U.S. at 312-315.

Mr. Justice Harlan, joined by Mr. Justice Stewart in dissent, rejected the approach of Justice White because, *inter alia*, there was no showing in the record that Senator Bacon would have acted otherwise but for the statute. 382 U.S. at 316, n. 1. We have discussed this causation problem above and shown that that difficulty is not present here. The constitutional challenge in these cases is directed against the existence of a State enactment authorizing and encouraging race discrimination. Thus these cases are in the posture as *Evans v. Newton* would have been had it arisen as a suit for a declaratory judgment invalidating the Georgia legislation authorizing dedication of segregated parks.

[15]See note 10, supra.

of such restrictions; the greater sophistication of Proposition 14's draftsmen which resulted in its superficially "neutral" language is matched by the considerable sophistication of the public. The California citizenry understood the meaning of Proposition 14 which, no less than the Georgia statute in *Evans*, would place the State on the side of race discrimination.

CONCLUSION

Proposition 14 assists and encourages race discrimination in several respects. It has disabled the local governmental bodies within the State from dealing with the problem of race discrimination in the residential housing market. It precludes the legislature from dealing with (and, presumably, even investigating) the problem of racial barriers to housing, It forbids executive action in this field. And it bars California courts from developing common law principles respecting the right to obtain housing irrespective of race. The effect of these radical innovations in the law of California is to establish a climate in which the perpetuation and development of racial barriers can prosper. Public and private affairs—the location of schools and parks, the acquisition of property, the planning and development of real estate developments—all can proceed with greater assurance that segregated housing patterns can be maintained. All aspects of state and local government are powerless to act to alter these conditions. Finally, it en-

shrines the "right to discriminate" in California's Constitution, thereby lending the State's stamp of approval to the exercise of this newly created "right".

For these reasons, we urge that the judgments of the California Supreme Court in both *Mulkey v. Reitman* and *Prendergast v. Snyder* be affirmed.

Dated, San Francisco, California,
March 1, 1967.

Respectfully submitted,

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